Supreme Court, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

THE WYANDOTTE NATION,
a federally recognized tribe,

Petitioner,

vs.

SAC AND FOX NATION OF MISSOURI, IOWA TRIBE OF KANSAS AND NEBRASKA, PRAIRIE BAND OF POTAWATOMI INDIANS, KICKAPOO TRIBE OF INDIANS AND BILL GRAVES, GOVERNOR OF THE STATE OF KANSAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL MINNIS, OBA #6521
DAVID MCCULLOUGH, OBA #10898
Counsel of Record
MICHAEL MINNIS & ASSOCIATES, P.C.
100 N. Broadway Ave., Ste. 3160
Oklahoma City, OK 73102-8805
(405) 235-7686 FAX (405) 232-5460
Attorneys for Petitioner
Wyandotte Nation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

170 pp

QUESTIONS PRESENTED

1. As a matter of first impression, whether a Federal Court of Appeals should make the determination of what lands constitute "a reservation" for purposes of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(a)(1)?

2. Whether the Tenth Circuit Court of Appeals determination that a tract of land in Kansas City, Kansas, is not a reservation of the Wyandotte Nation conflicts with 150 years of established law and is inconsistent with prior decisions of this court?

PARTIES TO THE PROCEEDINGS

Petitioner is the Wyandotte Nation (formerly known as the Wyandotte Tribe of Oklahoma prior to a Constitutional change), a federally-recognized Indian tribe with land holdings in Oklahoma and Kansas. The Wyandotte were allowed to intervene in the District Court proceedings in Kansas.

Respondents/Appellants below are Bill Graves as Governor of the State of Kansas and four federally-recognized Indian Tribes: the Sac and Fox Nation of Missouri, Iowa Tribe of Kansas and Nebraska, the Prairie Band of Potawatomi Indians, and the Kickapoo Tribe of Kansas.

Gale A. Norton, Secretary of the Interior (substituted for Bruce Babbitt as the named Defendant) was defendant in the District Court proceedings in Kansas and Appellee in the Tenth Circuit.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, The Wyandotte Nation, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The Opinion below is reported at 240 F.3d 1250 (10th Cir. 2001). Consistent with SUP. CT. R. 14.1(i), a copy of the Opinion below is included in the Appendix at App. 1.

JURISDICTIONAL STATEMENT

The petition is being filed within ninety (90) days after the entry of an order denying discretionary review. SUP. CT. R. 13.1. The Court of Appeals decision was filed February 27, 2001. Petitioner's timely filed a petition for panel rehearing. The petition for rehearing was denied June 14, 2001. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Federal agencies and officers are parties to this action. Service has been made upon the parties and, consistent with SUP. CT. R. 29.4(a) upon the Solicitor General.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2719(a)(1) of Title 25 of the United States Code provides, in relevant part: "Except as provided in

subsection (b) of this section, gaming regulated by this chapter shall be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988 unless * * * such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; * * * ."

Article 2, *Treaty with the Wyandott Indians*, March 17, 1842, 11 Stat. 581, provides that: "In consideration of the foregoing cession [of 148,000 acres of the Wyandott Reserve in Ohio], the United States hereby grant to the aforesaid Wyandott nation, a tract of land west of the Mississippi River, to contain one hundred and forty-eight thousand acres, and to be located upon any lands owned by the United States, now set apart, or may in future be set apart for Indian use, and not already assigned to any other tribe or nation."

Article 2, *Treaty with the Wyandotts*, January 31, 1855, 10 Stat. 1159, provides, in part, that: "The Wyandott nation hereby cede and relinquish to the United States, all their right, title, and interest in and to the tract of country situate in the fork of the Missouri and Kansas Rivers, which was purchased by them of the Delaware Indians, by an agreement dated the fourteenth day of December, one thousand eight hundred and forty-three, and sanctioned by a joint resolution of Congress approved July twenty-fifth, one thousand eight hundred and forty-eight, the object of which cession is, that the said lands shall be subdivided, assigned, and reconveyed, by patent, in fee simple, in the manner hereinafter provided for, to the individuals and members of the Wyandott nation, in severalty; except as follows, viz: The portion now enclosed

and used as a public burying-ground, shall be permanently reserved and appropriated for that purpose * * * ."

STATEMENT OF THE CASE

This case presents issues of first impression that concern both Indian lands and gaming. Under the Indian Gaming Regulatory Act ("IGRA"),[1] Class III gaming is generally proscribed on Indian lands. 25 U.S.C. § 2719(a). An exception to this proscription is land "located within or contiguous to the boundaries of the reservation of the Indian tribe on the date of enactment of" IGRA. 25 U.S.C. § 2719(a)(1).

A tract of land known as the Huron Cemetery has been reserved by the United States for the exclusive use of the Wyandotte for over 150 years. A contiguous parcel known as the Shriner Tract was taken into trust by the United States for the Wyandotte during this litigation. Despite the Huron Cemetery's nearly 160 year status as a reservation, and contrary pronouncements by the Secretary of the Interior ("Secretary") and the District Court, the Tenth Circuit Court of Appeals held that the term "reservation" as used in 25 U.S.C. § 2719(a)(1) is ambiguous, refused to defer to the Secretary's conclusion that the Huron Cemetery is a "reservation under" IGRA, found that the National Indian Gaming Commission ("NIGC") had the exclusive power to determine what

[1] Pub. L. 100-497, § 1, Oct. 17, 1988, 102 Stat. 2467 (codified at 25 U.S.C. §§ 2701 to 2721).

lands were "a reservation" under § 2719(a)(1), and presumed that NIGC would have determined that the Huron Cemetery was not "a reservation" under § 2719(a)(1). In making these holdings, the Appeals Court erred.

A. Background.

1. A Brief History of the Huron Cemetery, land reserved for the Wyandotte.

In an 1842 Treaty, the Wyandotte ceded its lands in Michigan and Ohio in return for certain payments and a 148,000 acre reservation west of the Mississippi River. *Treaty with the Wyandott Indians*, March 17, 1842, 11 Stat. 581. *See* App. 51.

When the United States failed to provide the 148,000 acres, the Wyandotte obtained 39 sections of land[2] from the Delaware Nation's Kansas reservation.[3] This transaction creating the Wyandotte Kansas reservation was subsequently approved by Congress. *Resolution to Sanction an Agreement made between the Wyandotts and Delawares for the Purchase of Certain Lands*, July 25, 1848, 9 Stat. 337. *See* App. 59. The Huron Cemetery was located inside the boundaries of the Wyandotte Kansas Reservation.

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[2] The Wyandotte purchased 36 sections and the Delaware donated an additional three sections.

[3] The Delaware Kansas reservation was established by a treaty signed September 24, 1829. *See* 7 Stat. 327. In the treaty, the United States pledged "the faith of the government to guarantee to said Delaware Nation forever, the quiet and peaceable possession and undisturbed enjoyment of the same, against the claims and assaults of all and every other people whatever."

In 1855, the United States forced the Wyandotte to cede their interest in most of the lands in the Wyandotte Kansas Reservation. *Treaty with the Wyandotte*, January 31, 1855, 10 Stat. 1159. *See* App. 65. However, the Huron Cemetery was specifically excepted from the land cessions to the United States. *Id.* at Art. 2. In other words, the Huron Cemetery is what remains of the Wyandotte Kansas reservation.

Twice thereafter, Congress tried unsuccessfully to force the sale of the Huron Cemetery. The first attempt occurred in 1906 when Congress authorized the Secretary of the Interior to sell the Huron Cemetery.[4] Despite this authorization and a failed attempt to enjoin the sale,[5] the Secretary never effected the sale and Congress subsequently repealed its authorization.[6] The second attempt by Congress was more serious because the forced sale of the Huron Cemetery was part of an effort to terminate the Wyandotte as a tribe. Act of August 1, 1956, 70 Stat. 893. *See* App. 96. One requirement for termination of the Wyandotte as a tribe was that the Huron Cemetery "be transferred or sold in accordance with §§ (a) and (b) of this section." *Id.* Because the forced sale never occurred, the Wyandotte were not terminated as a tribe.

> The Act of August 1, 1956 (70 Stat. 893) terminated the federal relationship with the Wyandotte Tribe, contingent upon the transfer of all tribal assets. Since this transfer has yet to

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[4] 34 Stat. 325, *reprinted at* App. 76.

[5] *Conley v. Ballinger*, 216 U.S. 84, 90 (1910).

[6] 37 Stat. 668, *reprinted at* App. 85.

> be completed, the Wyandottes are not technically terminated; however, they are not currently receiving federal services.

H.R. Rep. No. 95-1019 (April 11, 1978), *reprinted in* 1978 U.S.C.A.A.N. 757, *reprinted at* App. 110. In 1978, the Act of 1956 was repealed and Congress enacted a law that provided: "The validity of the organizational Wyandotte Indian Tribe of Oklahoma under § 3 of the Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C. § 503) and the continued application of said Act to such tribe and its members is hereby confirmed." Pub. L. 95-281(3)(c), 92 Stat. 246 (May 15, 1978). App. 106.

In any event, the status of the Huron Cemetery as a reservation for the Wyandotte has been consistently recognized since 1843.

2. The Wyandotte ask the United States to take the Shriner tract in trust.

In 1996, the Wyandotte asked the Secretary to take the Shriner Tract in trust for the purpose of conducting Class II and Class III gaming thereon. The Wyandotte trust application stated that the Shriner Tract was located contiguous to the boundaries of tribal reservation land (the Huron Cemetery) that existed prior to October 17, 1988, the effective date of IGRA.

On May 15, 1996, the Associate Solicitor, Division of Indian Affairs, issued a memorandum to the Director of the Indian Gaming Management Staff ("IGMS") stating the Department of the Interior "conclude[d] that the land [Huron Cemetery] is a reservation within the meaning of IGRA." App. 124.

On June 6, 1996, the IGMS forwarded a memorandum to the Assistant Secretary for Indian Affairs with a proposed notice for publication in the Federal Register. The IGMS found for Interior that the "Shriner tract is contiguous to a 1.9 acre parcel of property over which the Tribe exercises jurisdiction (the Huron Cemetery). * * * [T]he Associated Solicitor, Division of Indian Affairs, confirmed that the Huron Cemetery is a reservation for the Wyandotte Tribe of Oklahoma within the meaning of Section 20(a)(1) of the IGRA." App. 131.

On July 15, 1996, the Shriner's Tract was taken into trust by the United States for the use and benefit of the Wyandotte for gaming purposes because contiguous to a reservation existing prior to October 17, 1988.

B. The Proceedings Below.

This case arose when Bill Graves as Governor of the State of Kansas and four federally-recognized Indian Tribes – the Sac and Fox Nation of Missouri, the Iowa Tribe of Kansas and Nebraska, the Prairie Band of Potawatomi Indians, and the Kickapoo Tribe of Kansas (collectively "Kansas Plaintiffs") – filed two suits seeking to enjoin the United States from taking the Shriner Tract in trust. The Wyandotte were granted leave to intervene in the District Court actions. The suits were subsequently consolidated in the District Court and on appeal to the Tenth Circuit.

On March 2, 2000, the District Court entered judgment dismissing the actions below because the Wyandotte were an indispensable party and had not waived sovereign immunity by intervening in the case. The District Court also opined that the taking of the Shriner Tract in trust was a nondiscre-

tionary function of the Secretary. *See Sac and Fox Nation of Missouri v. Babbitt*, 92 F.Supp.2d 1124 (D.Kan. 2000). The District Court went on to state:

> The Court acknowledges that this holding leaves undecided the Huron Cemetery issue which could be critical to the underlying dispute between the plaintiffs and the Wyandotte Tribe, *i.e.*, whether there is casino-style gambling on the Shriner Tract. However, the court is convinced that the issue can be determined in another judicial forum under different circumstances which do not require a court to ignore settled case law regarding sovereign immunity and the waiver of sovereign immunity.

Sac and Fox Nation, 92 F.Supp.2d at 1129. From this judgment, the Kansas Plaintiffs appealed.

As noted earlier, the Appeals Court subsequently, *inter alia*, determined that the Secretary's decision that the Huron Cemetery was reservation land was not to be accorded deference and, on its own, determined that the Huron Cemetery was not reservation land for purposes of IGRA.

The Wyandotte sought a panel rehearing on two issues: (1) whether the Wyandotte had used Pub.L. 98-602, 98 Stat. 3151 funds to purchase the Shriner Tract, and (2) whether the Huron Cemetery is a "reservation" for purposes of IGRA. The United States sought rehearing on the refusal to defer to the Secretary's decision that the Huron Cemetery is a reservation. The Panel denied the petitions for rehearing on June 14, 2001. *See* App. 50.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE DETERMINATION OF WHAT LANDS ARE "A RESERVATION" FOR IGRA IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The Appeals Court decision will dramatically affect Indian lands and Indian gaming, two matters governed by federal law that are vitally important to Indian tribes throughout the nation and important to all citizens of the United States. If this important nationwide question is to be decided by the judiciary,[7] this Court should be the decision maker, not an Appeals Court.

The Appeals Court made an *ad hoc* determination of the reservation status of the Huron Cemetery and assigned to the National Indian Gaming Commission an heretofore unassumed role of determining what is reservation land prior to the effective date of IGRA. These determinations have several important effects. The most significant effect is the restriction on the use of the land imposed by this determination. Without reservation status, the beneficial owners of the land (the Wyandotte) are precluded from conducting Class III gaming on adjacent land.

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[7] As argued hereafter, the Wyandotte believe this issue (reservation status of land) has already been determined for the Huron Cemetery by this Court and/or by Congress and, in any event, should not be a matter of judicial discretion as implied by the Appeals Court decision. However, if judicial discretion is to control this issue, that discretion should be exercised by this Court, not by the Appeals Court.

Recognition of reservation status does not automatically equate to the establishment of Class III gaming. A tribe still must, at a minimum, raise the capital necessary to conduct gaming, negotiate a compact with the state, and obtain approval from NIGC. Nevertheless, the key, initial *sine qua non* for Indian gaming is location. Without land having reservation status at a viable location, a tribe cannot engage in the Class III gaming authorized by Congress.

The determination of reservation status of Indian lands for IGRA and who is to make that determination are important questions of federal law that should be settled by this Court, not by a Court of Appeals.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE APPEALS COURT'S DECISION THAT THE HURON CEMETERY IS NOT A RESERVATION CONFLICTS WITH OVER 150 YEARS OF ESTABLISHED LAW AND IS INCONSISTENT WITH DECISIONS OF THIS COURT

A. The decision below conflicts with this Court's decision in *Conley* that the Huron Cemetery was a reservation.

In determining that the Huron Cemetery was not reservation land, the Appeals Court did not address this Court's decision in *Conley* even though the decision was cited to the panel and concerned the same tract of land. Although refusing to enjoin the Secretary from selling the Huron Cemetery because the objecting Wyandottes

lacked standing, the Supreme Court clearly acknowledged that the Huron Cemetery was reservation land.

> When they [the Wyandotte Nation] made the grant they excepted this parcel. Therefore **it remained, as the whole of the land had been before**, in the ownership of the United States, subject to the recognized use of the Wyandottes. But the right of the Wyandottes was in them only as a tribe or nation. The right excepted was a right of the tribe.

Conley v. Ballinger, 216 U.S. at 90 (emphasis added).

Nothing has changed about the Huron Cemetery since 1843, and certainly not since 1910, that would materially alter this Court's conclusion that the Huron Cemetery was the remaining vestige of the Wyandotte Kansas Reservation. The Huron Cemetery was reservation land 100 years before IGRA became effective. Because the decision below conflicts with the *Conley* opinion, the petition should be granted.

B. The decision below conflicts with this Court's decisions in *Hitchcock* and *Spalding* defining "reservation."

The decision below created ambiguity where none existed and thus, assigned a role to NIGC that was certainly not contemplated by Congress and for which NIGC is not competent. The Panel refused to defer to the Secretary[8] suggested that the Secretary's interpretation[9] of "reservation" would muddy the distinction between

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[8] Since the Department of the Interior was created in 1849, the Secretary has been delegated virtually exclusive control

"reservation" and "trust lands." This suggestion is irrelevant to the Huron Cemetery which was a reservation nearly 100 years before Congress authorized the Secretary to take land in trust for tribes.[10] The putative

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over Indian affairs. Section 2 of Title 25 of the United States Code provides, in relevant part: "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the **management of all Indian affairs and of all matters arising out of Indian relations**." This delegation includes the authority to: "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs" (25 U.S.C. § 9); to take land into trust (*id.* § 465); and the authority to proclaim new reservations (*id.* § 467).

[9] Because neither the "Secretary nor the Department of the Interior in general is charged with administering IGRA", the "Secretary of the Interior lacked authority to interpret the term 'reservation' as used in IGRA, [the Panel Below] owe[s] no deference to [the Secretary's] interpretation." 240 F.3d at 1265, *reprinted at* App. 31-32. This conclusion is supported by the statutory law. IGRA authorized gaming and established NIGC to regulate the gaming authorized. IGRA did not purport to repeal or eliminate the Secretary's exclusive administrative role over Indian affairs to make initial determinations of such things as who is a federally-recognized Indian tribe, what land will be held in trust for a tribe, or what land is a reservation. All of these determinations are necessary predicates for gaming under IGRA, but none has been explicitly or implicitly assigned to NIGC. NIGC regulates gaming, not who is a tribe or what land is a reservation. In any event, whatever role NIGC has been assigned by Congress it is prospective, *i.e.* concerned with future efforts to take land into trust not with what lands were reservations prior to IGRA's effective date.

[10] The Secretary was authorized to take land into trust for an Indian tribe by the Indian Reorganization Act of 1934, June 18, 1934, c. 576, 48 Stat. 985. *See* 25 U.S.C. § 465.

distinction between trust lands and reservation lands has no application to the Huron Cemetery. To avoid this "muddied" possibility, the Panel adopted its own definition of "reservation" that included a new essential element, to-wit: that the land had to be used by the "Tribe for purposes of residence." 240 F.3d at 1267, *reprinted at* App. 36. In so deciding, the Panel decided an important federal question in a way that conflicts with relevant decisions of this Court and acted contrary to its obligation to construe statutes "liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 718 (10th Cir. 2000); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461-62 (10th Cir. 1997).[11]

The tribe's use of the Huron Cemetery is not restricted by law. Without the formalities attendant to creating or disestablishing a reservation, that use could change at any moment. The Wyandotte could have used and may yet use the land "for purpose of residences." Considering the legislation, the 150 years of practice, and a review of the broadly diverse range of properties that today are considered reservations, Congress clearly did

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[11] Indeed, "if the [Act] can reasonably be construed as the Tribe would have it construed, it *must* be construed that way." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988) (emphasis in original); *see also* Congressional Record, September 26, 1988, H 8153 (Rep. Udall, IGRA's primary House sponsor, calling on Courts to apply "the Supreme Court's time-honoring rule of construction that any ambiguities in legislation enacted for the benefit of Indians will be construed in their favor.").

not intend "reservation" to mean only a residential area. It would be difficult, if not impossible in some cases, to draw a principled distinction between "reservation" lands that would be considered "reservations" under 25 U.S.C. 2719(a)(1), and "reservation" lands that would be excluded from that definition.[12] *Cf. Oklahoma Tax*

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[12] If Congress had wished to impose a definition of "reservation" different from the generally accepted definition used by the Secretary at the time IGRA passed, it could have done so. In adopting regulations for taking land into trust, the Secretary has provided that: "Unless another definition is required by the act of Congress authorizing a particular trust acquisition, Indian reservation means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, * * * ." 25 C.F.R. § 151.2(f) (2000). Changes to Part 151 of Title 25 of the Code of Federal Regulations were proposed. 64 Fed. Reg. 17,574 (Apr. 22, 2000). After a comment period, a "final rule" was published to become effective April 16, 2001. 66 Fed. Reg. 3452 (Jan. 16, 2001). However, the effective date was subsequently extended to November 10, 2001, and the comment period re-opened. 66 Fed. Reg. 42474 (Aug. 13, 2001). As published, the "final rule" provides that: "The purpose of this part is to describe the authorities, policies, and procedures that we [Secretary of Interior] use to decide whether to accept title to land in the name of the United States to be held in trust for the benefit of an individual Indian or tribe." 66 Fed. Reg. 3452, 3459, § 151.1. "Reservation" is defined as that "area of land which has been set aside or which has been acknowledged as having been set aside by the United States for the use of the Tribe, the exterior boundaries of which are more particularly defined in a final treaty, Federal agreement, Executive of secretarial order, Executive or secretarial proclamation, United States patent, Federal statute, or final judicial or administrative determination." *Id.* at 3459, § 151.2.

Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 511 (1991) (noting complexities in evaluating status of Indian lands).

This Court has many times announced the characteristics of a reservation. The Court of Appeals did not need to invent new ones. The phrase "Indian reservation" is a term of art with certain very distinct judicially-recognized characteristics, to-wit:

1. a tract of land with definite boundaries;[13]
2. set aside by the federal government;[14]
3. for the exclusive use of an Indian tribe.

As the Secretary easily found, the Huron Cemetery possessed all of these characteristics. Although conceding that the status of the Huron Cemetery as a reservation is "arguably supported by language found in older Supreme Court cases, *e.g. Spalding v. Chandler*, 160 U.S. 394, 403 * * * (indicating that the creation of a reservation confers upon the tribe "the right to possess and occupy the lands for the uses and purposes designated"), as well as by current dictionary definitions of the term," the Court of Appeals nevertheless crafted its own definition

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[13] *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902) ("a certain defined tract" is prerequisite for a reservation).

[14] Since 1919, the formality required for creating a reservation has been an "Act of Congress." *See* 25 U.S.C. § 211. Since the United States was created, reservations were created by treaties. *See* U.S. CONST. art. I, § 8, cl. 3; art. II, § 2, cl. 2. Congress ended Indian treaty making in 1871. 25 U.S.C. § 71. Thereafter, reservations were created by statute or by executive order until 1919 when Congress ended the practice of creating executive order reservations. *See* 43 U.S.C. § 150.

for "reservation land." In doing so, it not only ignored Congress, 150 years of history, and the Secretary, it also decided an important federal question in a way that conflicts with relevant decisions of this Court defining "reservation lands."

C. The decision below conflicts with this Court's decisions in *Seymour* and *Celestine* that reservation lands retain their status as reservation absent an Act of Congress.

Relying on F. Cohen, *Handbook of Federal Indian Law*, 1982 ed., at 34, the Panel below wrote that

> the term "Indian reservation" originally had meant any land reserved from an Indian cession to the federal government regardless of tenure. * * * During the 1850's, the modern meaning of Indian reservation emerged, referring to land set aside under federal protection for the residence of tribal Indians, regardless of origin.

Sac and Fox Nation of Missouri, 240 F.3d at 1266. However, the Huron Cemetery was part of the Wyandotte Kansas Reservation prior to 1855. It was reservation land from the time the Wyandotte moved to Kansas and purchased the land from the Delawares in 1843. The Huron Cemetery was excepted from the land cessions authorized by the Treaty of 1855. In ratifying the treaty, Congress reconfirmed the reservation status of the Huron Cemetery.

Although the Panel below relied upon a general phrase in Cohen's book on Indian Law, Cohen himself specifically addressed the Huron Cemetery's status when he was in the Solicitor's office in 1947. Citing to the first

edition of his book wherein he had used the Wyandotte Tribe as an example of a tribe that continued to exist despite the many efforts at termination, Cohen wrote:

> The ownership and fee title to the cemetery tract are in the United States, subject to the recognized use of the Wyandotte Tribe. [footnote omitted] * * * . Considerations of good faith would appear to require in any such legislation that the consent of the Wyandotte Tribe be a condition to any such sale.

II Op. Interior Solicitor 1471, 1473.

> At the time these three decisions were rendered it was generally understood that the Wyandotte tribe had ceased to exist as a **political entity**. See Cohen, Handbook of Federal Indian Law, p. 273. While the Attorney General took the view, in 1908, that the right of the tribe could be regarded as abandoned, leaving the fee unencumbered and to be disposed of as to the Government may seem just and wise, the factual circumstances all point to a lack of abandonment. The available records do not purport to disclose in detail what interments were made over the years, but those records do show that the tract in question was being used as burial ground in 1922. Furthermore, in the year 1934 the local superintendent was advised concerning an inquiry as to whom applications should be made for burial in the cemetery. It was suggested to him that the matter should be taken up with the Wyandotte tribal officials with the view of determining who should issue permits for future burials, as well as the eligibility for such

> burials and the promulgation of rules and regulations relating to interments. Previously, in 1927, the officials of Kansas City, Kansas, had been informed that any requests for the interment of bodies in the cemetery should be referred to the local superintendent.

Id. at n. 31.

The Huron Cemetery is not an isolated, long-forgotten tract of land. It has been the subject of significant correspondence between the Bureau of Indian Affairs and sundry other individuals, has been the subject of litigation, and substantial legislation. The importance to the Wyandotte of the Huron Cemetery as reservation land can hardly be overstated because this reserved land saved the tribe from being terminated in the 1950s.

This Court has held that "when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 82 S.Ct. 424, 429 (1962), citing *United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93, 95.

When the Secretary acknowledged the Huron Cemetery as reservation land, he relied upon *United States v. Winans*, 198 U.S. 371, 378 (1905), *United States v. McGowan*, 302 U.S. 535 (1938) and *United States v. Pelican*, 232 U.S. 442 (1914) for the definition of "Indian Reservation." In 1945, the Solicitor's office issued an opinion entitled "Judicial and Departmental Construction of the Words 'Indian Reservation' " citing this Court's decision in *Minnesota v. Hitchcock*:

> * * * whether a selection of the tract, afterwards known as the Indian reserve was made by the Indians subsequent to the making of the treaty and acquiesced in by the United States Government, or whether the selection was made by the Government and acquiesced in by the Indians, is immaterial. * * * If the reservation was free from objection by the Government, it was as effectual as though the particular track was specifically designated by boundaries in the treaty itself. The reservation thus created stood precisely in the same category as other Indian reservations whether established for general or **limited uses** and whether made by the direct authority of Congress in the ratification of a treaty or indirectly through the medium of a duly authorized executive officer.

II Op. of the Solicitor 1378, 1379 *quoting Minnesota v. Hitchcock, supra,* 185 U.S. at 389.

Because the Huron Cemetery has been a reservation since 1843 and Congress has not acted to change that status, the Panel decision is in conflict with relevant decisions of this Court that reservation status cannot be changed by the judiciary but only by an Act of Congress.

CONCLUSION

This Court should grant the petition for *certiorari*, reverse the Panel below's decision that the Huron Cemetery is not reservation land.

Respectfully submitted,

MICHAEL MINNIS, OBA #6251
DAVID MCCULLOUGH, OBA #10898*
MICHAEL MINNIS & ASSOCIATES, P.C.
100 N. Broadway Ave., Ste. 3160
Oklahoma City, OK 73102-8805
(405) 235-7686 FAX (405) 232-5460
Attorneys for Wyandotte Nation, Petitioner

* *Counsel of Record*

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SAC AND FOX NATION OF MISSOURI; IOWA TRIBE OF KANSAS AND NEBRASKA; PRAIRIE BAND OF POTAWATOMI INDIANS; BILL GRAVES, Governor of State of Kansas,	)	
Plaintiffs-Appellants,	)	No. 00-3063
v.	)	(Filed Feb. 27, 2001)
GALE A. NORTON,[1] Secretary of the Interior; WYANDOTTE TRIBE OF OKLAHOMA,	)	
Defendants-Appellees.	)	

Appeal from United States District Court for the District of Kansas (D.C. No. 96-CV-4129)

John R. Shordike, Alexander & Karshmer, Berkeley, California, for the appellant Sac and Fox Nation of Missouri (Thomas Weathers, Alexander & Karshmer, for the appellant Sac and Fox Nation of Missouri; Stephen D.

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[1] Pursuant to Fed. R. App. P. 43(c)(2), Gale A. Norton is substituted for Bruce Babbitt, Secretary of the Interior, as a defendant in this action.

McGiffert and Mark S. Gunnison, Payne & Jones, Chartered, Overland Park, Kansas, for the appellants Sac and Fox Nation of Missouri and Iowa Tribe of Kansas and Nebraska; M.J. Willoughby, Assistant Attorney General, Topeka, Kansas, for the appellant Bill Graves; Mason D. Morisset and M. Frances Ayer, Morisset, Schlosser, Ayer & Jozwiak, Seattle, Washington, for the appellant Prairie Band of Potawatomi Indians, with him on the brief).

Jeffrey C. Dobbins, Department of Justice, Washington, D.C., (Lois J. Schiffer, Assistant Attorney General; Jackie N. Williams, United States Attorney; Jackie Rapstine, Assistant United States Attorney; David C. Shilton, Department of Justice; John Jasper, of counsel, with him on the brief), for the appellee Bruce Babbitt.

David McCullough (Michael Minis and Michael McMahan, with him on the brief), Michael Minis & Associates, P.C., Oklahoma City, Oklahoma, for the appellee Wyandotte Tribe of Oklahoma.

Before **HENRY, BRISCOE**, Circuit Judges, and **JENKINS**, District Judge.[2]

BRISCOE, Circuit Judge

Plaintiffs Sac and Fox Nation of Missouri, Iowa Tribe of Kansas and Nebraska, Prairie Band of Potawatomi Indians, and Bill Graves, the Governor of the State of

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[2] The Honorable Bruce S. Jenkins, Senior United States District Judge, District of Utah, sitting by designation.

Kansas, appeal the district court's dismissal of their action. Plaintiffs sought to prevent the Secretary of the Interior from taking a tract of land in downtown Kansas City, Kansas, into trust on behalf of the Wyandotte Tribe of Oklahoma, and approving gaming activities on that tract of land under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701-19. The district court dismissed the action for failure to join the Wyandotte Tribe as a necessary and indispensable party. We exercise jurisdiction pursuant to 28 U.S.C. § 1291, and reverse the district court's dismissal. With respect to the merits of plaintiffs' actions, which we reach because the district court issued alternative holdings, we conclude (1) Pub. L. 98-602 imposed a nondiscretionary duty on the Secretary to acquire land in trust for the Wyandotte Tribe; (2) the Secretary was not required to comply with the National Environmental Policy Act or the National Historical Preservation Act before acquiring land pursuant to Pub. L. 98-602 because the exercise of the Secretary's duty to acquire the land was nondiscretionary; (3) the Secretary acted arbitrarily in determining that only Pub. L. 98-602 funds were used to acquire the tract of land in downtown Kansas City; and (4) the Secretary erred in approving gaming activities on the acquired tract of land. We remand the case to the district court with directions to enter partial judgment consistent with our holdings and to remand in part to the Secretary for further consideration of whether Pub. L. 98-602 funds were used for the acquisition.

I.

The underlying facts of this case are largely uncontroverted. Between 1795 and 1842, the Wyandotte Tribe[3] (the Wyandottes) ceded much of their territory in southeastern Michigan and northern Ohio to the United States. This culminated with the signing of a March 17, 1842, treaty in which the Wyandottes ceded all of their remaining land in Michigan and Ohio in return for certain payments and a promised 148,000-acre reservation west of the Mississippi River. In December 1843, the Wyandottes acquired from the Delaware Nation of Indians thirty-six sections of land (23,040 acres) in Kansas situated at the point of the junction of the Missouri and Kansas Rivers (an area now known as Wyandotte County, Kansas). In 1850, the United States reimbursed the Wyandottes for the purchase of the Kansas land to fulfill its obligation under the 1842 treaty.

In 1855, the Wyandottes entered into another treaty with the United States and agreed to dissolve the tribe, become United States citizens, and cede all of their lands to the United States, which in turn would divide the land among the former members of the tribe. The 1855 treaty contained one relevant exception to the Wyandottes' cession agreement: "The portion now enclosed and used as a public burying-ground, shall be permanently reserved and appropriated for that purpose."[4] Admin. Record at 8.

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[3] According to the record, the spelling of the Tribe's name has changed over the years. In the 1800s, it was spelled "Wyandot."

[4] By his opinion dated February 4, 1908, the United States Attorney General concluded the 1855 treaty did not dedicate the

That tract, known as the Huron Cemetery, is the focal point of this litigation.

The 1855 treaty resulted in the splintering of the Wyandottes into two groups – those who accepted citizenship and those who did not. Those who accepted citizenship and received portions of the ceded land are known as the "Absentee" or "Citizen" Wyandots.[5] The small group (approximately 200) who did not accept citizenship and did not receive any of the ceded land were officially reconstituted by Congress in 1867 as the Wyandotte Tribe.[6] The reconstituted tribe settled in Oklahoma on land that had formerly belonged to the Seneca Indians.

In 1906, Congress approved an act granting authority to the Secretary of the Interior to sell the Huron Cemetery. Act of June 21, 1906, 34 Stat. 348. The sale never occurred, however, and in 1913, Congress repealed the authority to sell. Act of Feb. 13, 1913, 37 Stat. 668. In 1916, Congress appropriated $10,000 for the "preservation and improvement" of the Huron Cemetery "owned by the government of the United States, the use of which was conveyed by treaty to the Wyandotte Tribe of Indians." Act of Sept. 8, 1916, 39 Stat. 844. In 1918, the United States

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land in question to "the general public" for cemetery purposes, but rather "the evident intention" of the Wyandottes was "to continue the use of such grounds solely for the burial of their own dead." 26 Op. Att'y. Gen. 491 (1908).

[5] These members have retained the original spelling of the tribe's name.

[6] The 1855 treaty specifically afforded individual members of the tribe a limited time to apply for exemption from the provisions of the treaty. Thus, the tribe was never completely extinguished pursuant to the treaty.

and the City of Kansas City, Kansas, entered into a personal care contract for maintenance of the Huron Cemetery. The contract provided that the City of Kansas City would "forever" maintain and care for the cemetery, furnish police protection in and around the cemetery, and furnish electrical energy free of charge for maintenance of the electric lights inside the Huron Cemetery. *See* Pls. Br. at 16.

In 1956, consistent with the then-favored policy of promoting assimilation of tribal members, Congress enacted a law providing "for the termination of Federal supervision over the trust and restricted property of the Wyandotte Tribe of Oklahoma and the individual members thereof, and for a termination of Federal services furnished to such Indians because of their status as Indians." Admin. Record at 26 (Pub. L. No. 84-887, 70 Stat. 893 (1956)). In pertinent part, the law directed that the Huron Cemetery be sold by the United States.

> Title to the tract of land in Kansas City, Kansas, that was reserved for a public burying ground under article 2 of the treaty dated January 31, 1855 . . . with the Wyandotte Tribe . . . shall be transferred or sold . . . and the proceeds from any sale of the land may be used to remove and reinter the remains of persons who are buried there, to move any monuments now located on the graves, and to erect at reasonable cost one appropriate monument dedicated to the memory of the departed members of the Wyandotte Tribe.

Id. at 27.

The sale of the Huron Cemetery never occurred. This was due, apparently in part, to litigation filed against the United States by a group of Absentee Wyandots and the City of Kansas City, Kansas. The result, under the language of the 1956 Act, was that the Wyandotte Tribe was never actually terminated. *Id.* at 29 ("Upon removal of Federal restrictions on the property of the tribe . . . , the Secretary shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to the affairs of the tribe and its members has terminated."). In 1978, Congress enacted a law reinstating to the Wyandotte Tribe all rights and privileges that it might have lost under the 1956 Act. Pub. L. No. 95-281, 92 Stat 246 (1978) (codified at 25 U.S.C. § 861).

In 1984, Congress enacted legislation providing for the appropriation and distribution of money in satisfaction of judgments awarded to the Wyandottes by the Indian Claims Commission and the Court of Claims. *See* Pub. L. 98-602, 98 Stat. 3149 (1984). The judgments were compensation for lands in Ohio that the Wyandottes had ceded to the United States in the 1800s.[7] Under the 1984

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[7] In August 1978, the Indian Claims Commission awarded $561,424.21 to the Wyandotte Tribe. The award represented the Wyandotte Tribe's share of the additional compensation awarded to five tribes which ceded approximately three million acres in north central Ohio pursuant to the Fort Industry Treaty of July 4, 1805. Funds to cover the award were appropriated on October 31, 1978. In January 1979, the United States Court of Claims awarded $2,349,679.60 to the Wyandotte Tribe as additional compensation for approximately two million acres of land in northwestern Ohio ceded under an 1817 and an 1818 treaty. The funds to cover this award were appropriated on March 2, 1979.

law, Congress directed that 20% of the allocated funds "be used and distributed in accordance with" a series of directives. Key among the directives, for purposes of this case, was one providing that "[a] sum of $100,000 of such funds shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of such Tribe." Admin. Record at 77 (98 Stat. 3151).

In 1988, Congress enacted the IGRA. Generally speaking, the IGRA prohibits gaming "on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988." 25 U.S.C. § 2719(a). One exception allows gaming on trust lands acquired by the Secretary after October 17, 1988, if the "lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988." *Id.* § 2719(a)(1). The general prohibition of gaming on lands acquired by the Secretary in trust can also be avoided if

> the Secretary, after consultation with the Indian tribe and appropriate State, and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination.

Id. § 2719(b)(1)(A). There are also other exceptions that are not relevant here.

Due to its meager financial resources and the dim prospects for gaming on its Oklahoma reservation[8], the Wyandottes began a series of efforts aimed at conducting gaming activities at various sites in Kansas. In the early 1990s, the Wyandottes attempted, unsuccessfully, to have the Secretary take into trust on behalf of the tribe a parcel of land in Park City, Kansas. In 1994-95, the Wyandottes attempted, again unsuccessfully, to claim they were entitled to receive as "excess property" a former federal courthouse located in downtown Kansas City, Kansas, near the Huron Cemetery.

In April 1995, the Wyandottes authorized their chief to purchase four tracts of land in downtown Kansas City, Kansas, all of which abutted the Huron Cemetery. Included among those tracts was a .52 acre tract referred to by the parties as the "Shriner Tract," upon which stands the former Shrine Temple. The tribal resolutions specifically referenced Pub. L. 98-602 (the law providing for the use of $100,000 in allocated funds to purchase land for the Wyandottes), and provided that the purchase of the property would use funds distributed to the Wyandottes under section 105(b)(1) of the statute. The resolution also announced the Wyandottes' intent to conduct gaming on the property after its acquisition.

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[8] In *In re Sunflower Racing, Inc.*, 219 B.R. 587, 592 (Bankr. D. Kan. 1998), the bankruptcy court in the District of Kansas noted that the Wyandotte Tribe's "primary income [derived] from small farms and a convenience store on the reservation." The court further noted that "[s]ince the Wyandotte reservation is located near a number of other tribal reservations conducting gaming without great success, reservation gaming is unattractive to the Wyandotte Tribe." *Id.*

On January 29, 1996, the Wyandottes filed with the Secretary a Fee-to-Trust Land Acquisition Application for the four tracts of land. The application indicated that the Wyandottes planned "to develop and operate a 50,000 square foot Class II and Class III gaming facility" on the land. Admin. Record at 96. On February 13, 1996, the Associate Solicitor for the Division of Indian Affairs at the Department of Interior issued an opinion that the provisions of Pub. L. 98-602 mandated the Secretary to acquire the tracts of land in trust on behalf of the Wyandottes. Aplt. App. at 462. This opinion further concluded that, because the acquisition was mandated and thus non-discretionary, neither the provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 *et seq.*, nor the provisions of the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 *et seq.*, applied. Finally, the opinion concluded that the Huron Cemetery was a "reservation" for purposes of IGRA, and that the Wyandottes could conduct gaming on the property pursuant to 25 U.S.C. § 2719(a)(1), as long as they met the other applicable requirements of IGRA. The Associate Solicitor subsequently reaffirmed these conclusions in response to an inquiry from the Director of the Indian Gaming Management Staff for the BIA and challenges by the plaintiffs. In doing so, he emphasized that any future actions regarding the acquired property would require compliance with the NEPA and the NHPA.

In mid-April 1996, the Wyandottes narrowed the scope of their acquisition request to the Shriner Tract. It is unclear from the record precisely why they did so. After reviewing the Associate Solicitor's opinions, the Director of the Indian Gaming Management Staff for the BIA

recommended to the Assistant Secretary for Indian Affairs that the Shriner Tract be taken into trust for the Wyandottes. The Assistant Secretary concurred in the recommendation and directed the BIA Area Director for the Muskogee Area Office to take action. On June 12, 1996, pursuant to applicable Department of Interior regulations, the Department of the Interior published in the Federal Register a Notice of Intent to take the Shriner Tract into trust for the benefit of the Wyandottes. *See* 25 C.F.R. § 151.12(b). The purpose of the notice was to allow interested parties to seek judicial review of the proposed action.

On July 12, 1996, plaintiffs filed this action against the Secretary in federal district court challenging his decision to acquire the Shriner Tract in trust for the Wyandottes and his conclusion that the Wyandottes could lawfully conduct gaming on the acquired property under IGRA. Within hours of filing suit, plaintiffs sought and received a temporary restraining order (TRO) preventing the Secretary from taking the Shriner Tract into trust on behalf of the Wyandottes.

The Wyandottes immediately moved to intervene to challenge the TRO. The Wyandottes also filed a notice of interlocutory appeal seeking to appeal the TRO. On July 15, 1996, this court dissolved the TRO, noting that documents submitted by the Wyandottes indicated that if the contract for sale of the Shriner Tract was not closed that same day, "the right of the Secretary to acquire that property in trust" would expire. Aplt. App. at 57. In order "to preserve the status quo," this court dissolved the TRO "subject to the conditions which constitute the law of this case, that the respective rights of the parties to

obtain judicial review of all issues which have been raised in the complaint below shall be preserved, including standing of all parties, jurisdiction, compliance by the Secretary with all requirements of law, and the ultimate question of whether gaming shall be permitted on the subject land." *Id.* at 58. Following the issuance of this court's order, the Secretary consummated the proposed transaction by purchasing the Shriner Tract and taking it into trust on behalf of the Wyandottes.

After engaging in limited discovery, plaintiffs filed a motion seeking to reverse the Secretary's taking of the property into trust for the Wyandottes and to obtain a declaratory judgment that the Huron Cemetery was not a "reservation" of the Wyandottes for purposes of IGRA. The district court rejected plaintiffs' motion and dismissed the action. In doing so, the district court concluded that "the Wyandotte Tribe [wa]s a necessary party to th[e] litigation under FED. R. CIV. P. 19(a)," and that "the Wyandotte Tribe [wa]s a sovereign entity capable of asserting sovereign immunity." Aplt. App. at 144. The court also concluded that, even though the Wyandottes voluntarily intervened as a defendant, there had been no clear or unequivocal waiver of sovereign immunity "as to either taking the Shriner Tract into trust or declaring the Huron Cemetery to be 'reservation' land." *Id.* at 148. Further, the court concluded the Wyandottes were an indispensable party because (1) "[a]ny judgment against the Wyandotte Tribe in its absence would be extremely prejudicial to its land and economic interests," (2) "[a] judgment issued absent the presence of the Wyandotte Tribe would only lead to litigation attacking the judgment, and thus could be considered inadequate," (3)

"there may be an alternative venue for tackling the issues of casino gambling on the Shriner Tract and the status of the Huron Cemetery" because the Secretary had "indicated that some statutory considerations may apply to future actions relating to the property" and "the negotiation and approval of gaming compacts remain[ed] to be done." *Id.* at 149.

The district court issued alternative holdings on the merits of all but one of the issues raised by the plaintiffs. First, the court agreed with the Secretary that he was required by Pub. L. 98-602 to acquire the Shriner Tract in trust for the Wyandottes. Second, the court rejected plaintiffs' assertion that the Secretary acted arbitrarily or capriciously by failing to scrutinize whether Pub. L. 98-602 funds were actually used to purchase the Shriner Tract. The district court noted that the Secretary had accepted the representation of the Wyandottes on this matter and there was evidence in the record reflecting the Tribe's commitment to use Pub. L. 98-602 funds for the purchase. Third, the court rejected plaintiffs' argument that the Secretary acted improperly by acquiring the Shriner Tract without engaging in any NEPA or NHPA analysis. The court concluded that, because the Secretary was performing a nondiscretionary duty by taking the tract into trust for the tribe, neither the NEPA nor the NHPA applied to the decision. Finally, the district court refrained from deciding the question of whether the Huron Cemetery constituted a "reservation" for purposes of IGRA. In doing so, the court stated it was "convinced that the issue c[ould] be determined in another judicial forum under different circumstances which d[id] not

require a court to ignore settled case law regarding sovereign immunity and the waiver of sovereign immunity." *Id.*

II.

We begin by addressing whether the Wyandotte Tribe is a necessary and indispensable party to this action. "The question of whether an absent party is necessary and/or indispensable is resolved by applying Rule 19 of the Federal Rules of Civil Procedure." *Davis v. United States*, 192 F.3d 951, 957 (10th Cir. 1999); *see Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 94 F.3d 1407, 1411 (10th Cir. 1996) (indicating that a court must determine whether the party in question is necessary under Rule 19(a) before proceeding to decide whether the party is indispensable under Rule 19(b)). A district court's Rule 19 determinations are reviewed by this court under an abuse of discretion standard. *Id.* Any legal conclusions underlying a district court's Rule 19 determinations, however, are reviewed de novo. *Id.*

Rule 19(a) defines those persons who should be joined as parties to an action (and thus are considered necessary parties to the action):

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i)

> as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a).

It appears from the record that the district court based its Rule 19(a) ruling in large part upon assertions from the Wyandotte Tribe and the Secretary that the Wyandotte Tribe was a necessary party to this action.[9] Aplt. App. at 144. We conclude that application of Rule 19(a) demonstrates the Wyandotte Tribe is not a necessary party to this action.

The first consideration under Rule 19(a) is whether, in the absence of the Wyandotte Tribe, complete relief could be accorded among the persons already parties to the action. In our view, the answer is clearly "yes." Because plaintiffs' action focuses solely on the propriety of the Secretary's determinations, the absence of the Wyandotte Tribe does not prevent the plaintiffs from

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[9] We note the Secretary has reversed his position on appeal and now concedes that the Wyandotte Tribe is not a necessary party for purposes of Rule 19(a). *See* Gov't Br. at 26 ("In circumstances presented here, we believe (our position in the district court notwithstanding) that Rule 19 does not require dismissal of the challenge to the decision to take this property into trust for the Wyandottes.") and 29 ("After further consideration, we believe that certain aspects of our Rule 19 argument in the district court were incorrect."). That leaves only the Wyandotte Tribe, which has filed a brief with this court discussing the issues on the merits, to assert that the district court's Rule 19 determination was correct.

receiving their requested declaratory relief (i.e., a determination that the Secretary acted arbitrarily and capriciously (a) in taking the Shriner Tract into trust for the Wyandotte Tribe, (b) by failing to conduct an NEPA or NHPA review, (c) by failing to confirm that Pub. L. 98-602 funds were used, and (d) by concluding the Huron Cemetery was a "reservation" for purposes of IGRA). Moreover, we are not persuaded there is a likelihood of further lawsuits "involving essentially the same subject matter." 7 Charles A. Wright et al., *Federal Practice and Procedure* § 1604 at 45-46 (2d ed. 1986).

The second consideration under Rule 19(a) is whether the Wyandotte Tribe claims an interest relating to the subject of this action and, if so, whether disposition of this action in the Wyandotte Tribe's absence may as a practical matter impair its ability to protect that interest or subject any of the persons already parties to a substantial risk of inconsistent obligations. It is undisputed the Wyandotte Tribe has an economic interest in the outcome of this action. More specifically, the Wyandotte Tribe's ability to conduct gaming activities on the Shriner Tract will survive only if all of the Secretary's determinations regarding the Shriner Tract are upheld. The potential of prejudice to the Wyandotte Tribe's interests is greatly reduced, however, by the presence of the Secretary as a party defendant. As a practical matter, the Secretary's interest in defending his determinations is "virtually identical" to the interests of the Wyandotte Tribe.[10] *See*

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[10] We also note that, despite their contentions that they are entitled to sovereign immunity and should be deemed a necessary and indispensable party under Rule 19, the

Rishell, 94 F.2d at 1412; *see also Washington v. Daley*, 173 F.3d 1158, 1167-68 (9th Cir. 1999) (concluding Indian tribes were not necessary parties to actions filed by State of Washington against Secretary of Commerce challenging regulation allocating groundfish catches to tribes, inasmuch as the Secretary and the tribes had virtually identical interests and the United States could therefore adequately represent the tribes); 3A James Moore, Moore's Federal Practice ¶ 19.07[2.1], at 19-106 (2d ed. 1995) ("the fact that the absent person may be bound by the judgment does not of itself require his joinder if his interests are fully represented by parties present"). Further, we are not convinced that the Secretary (or any other party to this suit) would be subjected to a substantial risk of multiple or inconsistent obligations in the absence of the Wyandotte Tribe. As noted above, nothing in the record indicates the possibility of additional lawsuits involving this same subject matter. *See* Wright, *supra*, § 1604 at 62 ("The key is whether the possibility of being subject to multiple obligations is real; an unsubstantiated or speculative risk will not satisfy the Rule 19(a) criteria.").

Even assuming, arguendo, the Wyandotte Tribe could be considered a necessary party under Rule 19(a), we are not persuaded the Wyandotte Tribe is an indispensable party under Rule 19(b). A necessary party can be considered an indispensable party only if, "in equity and good

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Wyandottes have been heavily involved in defending this action and have filed a brief with this court addressing the merits of all the issues raised by plaintiffs.

conscience," a court should not allow the action to proceed in the party's absence. Fed. R. Civ. P. 19(b). To make this determination, a court must balance the following four factors set forth in Rule 19(b):

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b).

Applying these factors, we conclude the district court abused its discretion in finding the Wyandotte Tribe was an indispensable party. With respect to the first factor, it is true that the Wyandotte Tribe has an economic interest in proceeding with gaming activities on the Shriner Tract. As previously noted, however, the potential of prejudice to that interest is offset in large part by the fact that the Secretary's interests in defending his decisions are substantially similar, if not virtually identical, to those of the Wyandotte Tribe. Further, we note that the Wyandotte Tribe has filed pleadings at virtually all stages of this litigation and has consistently offered its views regarding why the Secretary's actions were appropriate. Because the potential for prejudice is minimal, "we need not be concerned with the second factor, which addresses the availability of means for lessening or avoiding prejudice." *Rishell*, 94 F.3d at 1412. With respect to the third factor, a

judgment rendered in the Wyandottes' absence would be adequate in our view because, regardless of the presence or absence of the Wyandottes, the claims in this action turn solely on the appropriateness of the Secretary's actions, and the Secretary is clearly capable of defending those actions. Moreover, as noted above, the absence of the Wyandotte Tribe does not prevent the plaintiffs from obtaining the relief requested in their complaint. Finally, and perhaps most important, there does not appear to be any alternative forum in which plaintiffs' claims can be heard. Although it is possible the Secretary might later require NEPA or NHPA compliance in order for the Wyandotte Tribe to take action with respect to the Shriner Tract, the instant action is the only opportunity for plaintiffs to challenge the remainder of the Secretary's determinations. *See Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) (noting that a court should be "extra cautious" before dismissing an action pursuant to Rule 19(b) if no alternative forum exists); *Rishell*, 94 F.3d at 1413 (noting that "[t]he absence of an alternative forum would weigh heavily, if not conclusively against dismissal").

In summary, we conclude the district court erred in characterizing the Wyandotte Tribe as a necessary and indispensable party and dismissing the plaintiffs' action under Rule 19.

III.

We turn to the merits of plaintiffs' action. Plaintiffs challenge the Secretary's determinations that: (1) acquisition of the Shriner Tract was mandated by Pub. L. 98-602; (2) NEPA and NHPA analyses were unnecessary prior to

acquisition of the Shriner Tract; and (3) only Pub. L. 98-602 funds were used to purchase the Shriner Tract. In addition, plaintiffs challenge the Secretary's determination that the Huron Cemetery is a "reservation" for purposes of IGRA.

Plaintiffs' challenges are brought pursuant to the Administrative Procedures Act (APA), 5 U.S.C. §§ 701-706. Under the APA, we cannot set aside an agency decision unless it fails to meet statutory, procedural or constitutional requirements, or unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A)-(D); *see Public Lands Council v. Babbitt*, 154 F.3d 1160, 1166 (10th Cir. 1998), *aff'd* 529 U.S. 728 (2000). Although the district court passed upon all but one of the plaintiffs' challenges to the Secretary's decisions, we owe no deference to the district court's decision. Rather, the scope of our review is de novo. *Public Lands Council*, 154 F.3d at 1166.

Because the agency decisions at issue here involve interpretations of federal statutes, our review is guided by the principles announced in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The first question "always, is . . . whether Congress has directly spoken to the precise question at issue." *Id.* at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But if the statute is silent or ambiguous, we are generally required to defer to the agency's interpretation "if it is based on a permissible construction of the statute." *Id.* at 843. More specifically, if we find "an express delegation of authority to the

agency to elucidate a specific provision of the statute by regulation," we must accept the agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44. Alternatively, if we do not find an express delegation by Congress, but nevertheless perceive an implicit delegation to the agency on the particular question, we must accept a "reasonable interpretation made by the administrator of [the] agency." *Id.* at 844.

Was acquisition of the Shriner Tract mandated by Pub. L. 98-602?

Plaintiffs contend the Secretary violated the APA by concluding he had a nondiscretionary duty under Pub. L. 98-602 to acquire the Shriner Tract in trust for the Wyandotte Tribe. According to plaintiffs, the Secretary remained obligated "to satisfy the requirements of the trust statute, 25 U.S.C. § 465, and regulations, 25 C.F.R. §§ 151.1 *et seq.*, and to exercise his discretion as required by law in processing any trust application" filed by Wyandotte Tribe pursuant to Pub. L. 98-602. Pls. Br. at 88.

Generally speaking, the Secretary has broad discretion under the Indian Reorganization Act of 1934 (IRA) (the "trust statute" referred to by plaintiffs), 25 U.S.C. § 465, to decide whether to acquire land in trust on behalf of Indian tribes. That statute authorizes the Secretary, "in his discretion, to acquire . . . any interest in lands . . . , within or without existing reservations, . . . for the purpose of providing land for Indians." *Id.* When the Secretary acts pursuant to the IRA, title to any such lands is "taken in the name of the United States in trust for the

Indian tribe or individual Indian for which the land is acquired." *Id.* To assist in deciding which lands to take into trust under the IRA, the Secretary has promulgated regulations (the "trust regulations" referred to by plaintiffs). *See* 25 C.F.R. §§ 151 *et seq.* In pertinent part, those regulations set forth a "Land acquisition policy," which provides:

> (a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status: (1) when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or (2) when the tribe already owns an interest in the land; or (3) when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

25 C.F.R. § 151.3(a).

Notwithstanding the IRA and its implementing regulations, the Secretary concluded that his discretion regarding whether to acquire the Shriner Tract on behalf of the Wyandotte Tribe was curtailed by Pub. L. 98-602. The Secretary based his conclusion on Section 105 of Pub. L. 98-602, entitled "DISTRIBUTION TO WYANDOTTE TRIBE OF OKLAHOMA," which provides in pertinent part:

> (b) Twenty percent of the funds allocated to the Wyandotte Tribe of Oklahoma pursuant to section 103(b) shall be used and distributed in accordance with the following general plan:

> (1) A sum of $100,000 of such funds shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of such Tribe.
>
> * * *
>
> (c)(1) Except as provided in paragraph 2 and notwithstanding any other provision of law, the approval of the Secretary for any payment or distribution by the Wyandotte Tribe of Oklahoma of any funds described in subsection (b) . . . shall not be required and the Secretary shall have no further trust responsibility for the investment, supervision, administration, or expenditure of such funds.
>
> (2) The Secretary may take such action as the Secretary may determine to be necessary and appropriate to enforce the requirements of this title.

Admin. Record at 77 (98 Stat. 3151).

In our view, the Secretary's interpretation is easily affirmed under the first test set forth in *Chevron*, i.e., "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. Although subsection (b)(1) of Section 105 could be construed as ambiguous when examined in isolation, subsection (c)(1) resolves any potential ambiguities by indicating that, "notwithstanding any other provision of law, the approval of the Secretary for any payment . . . by the Wyandotte Tribe . . . of any funds described in subsection (b) . . . shall not be required." *See United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988) (indicating that statutory terms are often "clarified by the remainder of the statutory scheme"). Subsection

(c)(1) clearly indicates that the Secretary shall have no discretion in deciding whether to take into trust a parcel of land purchased by the Wyandotte Tribe with Pub. L. 98-602 funds. We therefore agree with the Secretary and the district court that, notwithstanding the provisions of the IRA, Pub. L. 98-602 imposed a nondiscretionary duty on the Secretary.

Was NEPA or NHPA analysis necessary prior to acquisition of Shriner Tract?

Plaintiffs contend the Secretary violated the APA by determining it was unnecessary for the agency to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, or the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 *et seq.*, prior to acquiring the Shriner Tract in trust for the Wyandotte Tribe. In response, the Secretary contends analysis under the NEPA and the NHPA is unnecessary due to the mandatory nature of the acquisition. In other words, the Secretary contends, because there was no discretion involved in acquiring the Shriner Tract, NEPA and NHPA analysis would have been pointless.

Both the NEPA and the NHPA require federal agency heads to take certain steps prior to engaging in certain actions. The NEPA delineates a procedure for federal agencies to follow when any "major federal action" they propose to undertake could pose potential environmental harms. Somewhat similarly, the NHPA requires federal agency heads to take into account the impact of any "Federal or federally assisted undertaking" on sites listed or eligible for listing in the National Register of Historic

Places. *See* 16 U.S.C. § 470f. The NHPA also requires that the Advisory Council on Historic Preservation be given a reasonable opportunity to comment on such undertakings. *Id.*

Because Pub. L. 98-602 affords the Secretary no discretion with respect to the Shriner Tract acquisition, we conclude the Secretary reasonably determined that no NEPA or NHPA analysis was required prior to the acquisition. Several circuits have held that NEPA compliance is unnecessary where the agency action at issue involves little or no discretion on the part of the agency. *E.g., Sierra Club v. Babbitt,* 65 F.3d 1502, 1512 (9th Cir. 1995) (collecting cases demonstrating that nondiscretionary agency action is excused from the operation of NEPA); *Sugarloaf Citizens Ass'n v. FERC,* 959 F.2d 508, 513 (4th Cir. 1992) ("Other Circuits have held that when an agency has no discretion to consider environmental values implementing a statutory requirement, its actions are ministerial and not subject to NEPA."); *Goos v. ICC,* 911 F.2d 1283, 1296 (8th Cir. 1990) ("Because the ICC has not been granted any discretion under section 1247(d) to base its issuance of an NITU or CITU on environmental consequences, we agree that it would make little sense to force the ICC to consider factors which cannot affect its decision."); *Milo Cmty. Hosp. v. Weinberger,* 525 F.2d 144, 147 (1st Cir. 1975) (finding that no EIS was necessary where "consideration of the factors that the appellant has characterized as 'environmental considerations' could not have changed the Secretary's decision"). Although no courts have addressed whether NHPA compliance is necessary in such situations, we are persuaded that a similar rule should apply. Because of the operational similarity

between the two statutes, courts generally treat "major federal actions" under the NEPA as closely analogous to "federal undertakings" under the NHPA. *E.g., Ringsred v. City of Duluth*, 828 F.2d 1305, 1309 (8th Cir. 1987). In sum, because the Secretary exercised no discretion in acquiring the Shriner Tract, he reasonably concluded that NEPA or NHPA analysis would have been pointless, since neither could have had any impact on the acquisition.

Were Pub. L. 98-602 funds used to purchase the Shriner Tract?

Plaintiffs contend the Secretary acted arbitrarily and capriciously, and against the clear evidence in the agency record, by accepting without scrutiny the Wyandotte Tribe's representation that the Shriner Tract was purchased with only Pub. L. 98-602 funds. In response, the Secretary contends "[t]here is no reason to believe that the money used to purchase the Shriner tract was anything other than money available under Pub. L. 98-602."[11] Gov't Br. at 41-42.

Although the Secretary attempts to support his contention by citing various documents contained in the administrative record, the documents in fact suggest that

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[11] Plaintiffs' argument is based upon their assumption that Section 105(b)(1) of Pub. L. 98-602 applies only if funds allocated under that section are used to purchase a particular parcel of real property. In his appellate brief, the Secretary did not dispute this assumption. At oral argument, however, the Secretary attempted to assert that he concluded, prior to the acquisition, that Section 105(b)(1) required only that the majority of funds used for an acquisition were Pub. L. 98-602 funds. This assertion is not borne out by the record, nor by the arguments in the Secretary's brief. We therefore disregard it.

nearly half of the funds used to acquire the Shriner Tract were non-Pub. L. 98-602 funds. First, the Secretary points to an April 12, 1995 resolution of the Wyandotte Tribe authorizing the fee-to-trust application. Although it is true the resolution indicates that Pub. L. 98-602 funds will be used for the proposed acquisition, it in fact states that the Tribe "will purchase the Kansas City Tract with *a portion* of the PL 602 set aside funds." Admin. Record at 82 (emphasis added). The reference at best would indicate part of the monies set aside for tribal use in Pub. L. 98-602 would be used in this purchase. Second, the Secretary cites to an April 19, 1996, letter from the Wyandotte Tribe to BIA in which the Tribe outlines its plan for purchasing the Shriner Tract. Although the letter indicates "the Shriner's land" will be purchased for $100,000 using funds "wired from the [Pub. L. 98-602] trust account maintained by the Mercantile Bank of Joplin, Missouri," the letter goes on to state that "[t]he funds required for closing on the Shriner's building [which the Tribe intended to purchase for $80,000] will be wired from *another tribal account.*" *Id. at 269* (emphasis added). In other words, the letter seems to suggest that only the land, but not the building, was purchased with Pub. L. 98-602 funds. Another document cited by the Secretary, an internal e-mail message from one BIA employee to another, seems to suggest that at least some agency employees were aware that the Pub. L. 98-602 funds remaining and available to fund this purchase would not cover the entire purchase price of the Shriner Tract.

Based upon these documents, which are not contradicted by any other documents in the record, we conclude the Secretary's determination that only Pub. L.

98-602 funds were being used for the purchase was not supported by substantial evidence in the record. We therefore reverse with directions to the district court to remand the matter to the Secretary for further consideration of this issue.

Is the Huron Cemetery a "reservation" for purposes of IGRA?

The final, and indeed critical, issue raised by plaintiffs is whether the Secretary acted arbitrarily or capriciously in concluding that the Huron Cemetery constitutes a "reservation" for purposes of IGRA. The district court did not address the question of whether the Huron Cemetery constitutes a "reservation" for purposes of IGRA. Because the facts relevant to that issue are uncontroverted and the issue thus hinges on a question of statutory interpretation, we have discretion to decide it in the first instance and conclude that doing so is in the interests of judicial economy. *E.g., United Food & Commercial Workers Union v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998) ("Although we will generally decline to consider in the first instance issues not considered by the district court, we will make an exception where injustice might otherwise result, or where the issue presents only a question of law."); *Travelers Ins. Co. v. Pataki*, 63 F.3d 89 (2d Cir.1995) (concluding that appellate court had discretion to decide in the first instance a question of law not reached by the district court).

Plaintiffs contend the Secretary's determination that the Huron Cemetery is a "reservation" for purposes of IGRA is wrong for several reasons. First, plaintiffs argue that when the land upon which the cemetery now rests

was acquired by the Wyandottes from the Delawares, there was never any declaration that it was intended to be the Wyandottes' reservation. Second, plaintiffs argue that nothing in the 1855 Treaty indicates that the United States or the Tribe intended for the cemetery to operate as a reservation. Third, plaintiffs contend that in enacting IGRA, Congress specifically distinguished between "reservation" and "lands held in trust" by the United States for a tribe. According to plaintiffs, Congress clearly intended for the term "reservation" to include only land that is actually used for the residence of tribal members (and, through use of the phrase "the Tribe's reservation," indicated that each Tribe would have only one reservation for purposes of IGRA). Plaintiffs argue that the cemetery does not fall within this definition because it is a free-standing public burial ground, situated more than 200 miles away from the Oklahoma reservation upon which the tribal members actually reside. Fourth, plaintiffs argue that the Wyandotte Tribe has not manifested tribal governmental jurisdiction over the cemetery. Finally, plaintiffs argue that the Secretary's determination is contrary to public policy as expressed in IGRA. For example, plaintiffs contend, Congress intended by way of IGRA to provide "employment on reservation for tribal members, members who may be traditionally plagued by few employment opportunities unless they leave the reservation." Pls. Br. at 59. Here, plaintiffs argue, "a casino located in downtown Kansas City, Kansas provides no on-reservation employment for members of the Wyandotte Tribe . . . , who reside more than 200 miles away and would have to leave the Oklahoma reservation to work in the facility." *Id.* at 59-60.

In response, the Secretary contends that he construed the term "reservation," as used in IGRA, in a manner consistent with its "usual meaning." According to the Secretary, the phrase originally "referred to any land reserved from an Indian cession to the federal government," Gov't Br. at 52 (citing *United States v. Winans*, 198 U.S. 371, 378 (1905)), but has since evolved "to include land set aside under federal protection, whether by executive order or otherwise, for the use of tribal Indians, regardless of origin." *Id.* Under this definition, the Secretary contends, it is enough that the property at issue has been set aside for some purpose by the federal government, and there is no requirement that tribal members actually reside on the property. The Secretary contends the Huron Cemetery "falls squarely within this definition":

> In 1848, the United States approved of, and in 1850, the United States paid for, the Wyandottes' purchase of Kansas property in satisfaction of the United States' 1842 promise to the Tribe that it would reserve Kansas lands for the Tribe. In 1855, the Tribe ceded that land to the United States, but the Treaty specifically excepted the Huron Cemetery from the cession. By expressly and unambiguously reserving the cemetery, the treaty gave it the same status as the whole parcel of land had before the cession and allotment. At the very least, as land reserved from an Indian cession to the federal government, the property would fall within the traditional definition of a "reservation."

Id. at 54 (citations omitted). Finally, the Secretary argues that the status of property as a "reservation" under IGRA "is not altered by the failure of a tribe to assert its

jurisdiction over land or the assertion of such jurisdiction by others." *Id.* at 54-55. Instead, the Secretary argues, "only explicit congressional action can alter a property's reservation status." *Id.* at 55.

To resolve this issue, we again return to the *Chevron* framework. Because IGRA does not specifically define the term "reservation," the parties agree, as do we, that Congress has not "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Normally, under *Chevron*, the next step would be to determine whether the Secretary's interpretation is based upon a permissible construction of the statute. Significantly, however, neither the Secretary nor the Department of the Interior in general is charged with administering IGRA. When Congress enacted IGRA, it established the National Indian Gaming Commission (Commission) and charged the Commission with the exclusive regulatory authority for Indian gaming conducted pursuant to IGRA.[12] 25 U.S.C. § 2704. That authority includes "promulgat[ing] such regulations and guidelines as it deems appropriate to implement the provisions" of IGRA. 25 U.S.C. § 2706(b)(10). Presumably, the Commission's authority also includes interpreting any ambiguous phrases or terms contained in IGRA.

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[12] Although the Commission is nominally part of the Department of the Interior, the Secretary conceded at oral argument that the Commission functions as an independent entity. In any event, Congress expressly indicated that it was only the Commission that had authority to oversee IGRA. For example, although Congress granted the Secretary interim authority to regulate Indian gaming, that authority was to cease at the point at which the Commission was organized and issued regulations. 25 U.S.C. § 2709.

Reviewing the record in this case, there is no indication that the Commission had any involvement in deciding whether the Huron Cemetery constituted a "reservation" for purposes of IGRA. To the contrary, the record indicates that a preliminary determination of the issue was first made by the Associate Solicitor for the Division of Indian Affairs. That determination was reviewed and adopted by the Director of the Indian Gaming Management Staff. Further, there is no indication in the record of any connection between the Indian Gaming Management Staff and the Commission. Finally, the determination was adopted by the Assistant Secretary for Indian Affairs. No documents indicate that the determination was reviewed by the Commission.[13]

Because the Secretary lacked authority to interpret the term "reservation," as used in IGRA, we owe no deference to his interpretation. *E.g., Adams Fruit Co. v. Barrett,* 494 U.S. 638, 649 (1990) (refusing to defer to Secretary of Labor's interpretation of specific provision of the Migrant and Seasonal Agricultural Worker Protection Act because Congress had not charged the Secretary with overseeing the statute); *Passamaquoddy Tribe v. Maine,* 75 F.3d 784, 793-94 (1st Cir. 1996) (refusing to grant *Chevron* deference to Indian Gaming Commission's interpretation of Maine Indian Claims Settlement Act of 1980 because the Secretary of the Interior, and not the Commission, was charged with administering the statute); *cf. Bureau of Alcohol, Tobacco & Firearms v. FLRA,* 464 U.S. 89, 97 (1983)

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[13] At oral argument, the Secretary conceded that the Commission had no involvement in the determinations at issue in this case.

(refusing to sanction " 'unauthorized assumption by an agency of major policy decisions' ") (quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965)). Instead, we proceed to decide for ourselves the meaning of the term "reservation," as used in IGRA.

"The starting point for our interpretation of a statute is always its language." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989) (citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Unlike other federal statutes which contain specific definitions of the term "reservation," *e.g.*, 7 U.S.C. § 2012 (1994) (defining "reservation" as "the geographically defined area or areas over which a tribal organization . . . exercises governmental jurisdiction"); 25 U.S.C. § 1452(d) (1994) (defining "reservation" to include "Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act"), neither the specific statute at issue here, nor IGRA in general, defines the term "reservation." We therefore must infer, at least initially, that Congress intended " 'to incorporate the established meaning of the[ ] term[ ].' " *Reid*, 490 U.S. at 739 (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981)).

The parties disagree on the established meaning of the term "reservation." The Secretary suggests its established meaning broadly refers to any parcel of land set aside by the federal government for Indian use. This position is arguably supported by language found in older Supreme Court cases, *e.g.*, *Spalding v. Chandler*, 160 U.S. 394, 403 (1896) (indicating that the creation of a

reservation confers upon the tribe "the right to possess and occupy the lands for the uses and purposes designated"), as well as by current dictionary definitions of the term. *See* Black's Law Dictionary 1307 (6th ed. 1990) (defining the term "reservation," in part, as "[a] tract of land (under control of the Bureau of Indian Affairs) to which an American Indian tribe retains its original title to ownership or which has been set aside for its use out of the public domain"). In contrast, plaintiffs argue that the established common-law meaning of the term "reservation," as used in the context of Indian tribes, refers to land set aside by the federal government for the occupation of tribal members. Plaintiffs' position is supported by the leading treatise on Indian law, which indicates that "[t]he term 'Indian reservation' originally had meant any land reserved from an Indian cession to the federal government regardless of the form of tenure." F. Cohen, *Handbook of Federal Indian Law* at 34 (1982 Edition). The treatise goes on to state: "During the 1850's, the modern meaning of Indian reservation emerged, referring to land set aside under federal protection for the residence of tribal Indians, regardless of origin. By 1885 this meaning was firmly established in law." *Id.* at 34-35.[14]

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[14] In his appellate brief, the Secretary cites to a footnote on the same page of this treatise, while omitting the main text of the treatise which is quoted above. Gov't Br. at 52. By doing so, the Secretary omits the key phrase "for the residence of tribal Indians," and attempts to suggest that a "reservation" is land set aside by the federal government for Indian use. This is inconsistent with the treatise's description of the "modern meaning" of the term "Indian reservation."

Without deciding which party's view of the established meaning of the term "reservation" is correct, we conclude that the interpretation forwarded by plaintiffs is the one Congress intended to adopt when it enacted IGRA. As noted by plaintiffs, IGRA's use of the phrase "the reservation of the Indian tribe" in 25 U.S.C. § 2719(a)(1), suggests that Congress envisioned that each tribe would have only one reservation for gaming purposes. *See generally Bailey v. United States*, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning of the word [at issue] but also its placement and purpose in the statutory scheme."); *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) ("the meaning of statutory language, plain or not, depends on context"). Further, as pointed out by plaintiffs, IGRA specifically distinguishes between the "reservation" of an Indian tribe and lands held in trust for the tribe by the federal government. *E.g.*, 25 U.S.C. § 2719(a)(1)-(2), (b)(1)(B). Under the Secretary's proposed interpretation of the term "reservation," the line between the two would arguably be muddied. In other words, if the term "reservation" were to encompass all land held in trust by the government for Indian use (but not necessarily Indian residence), then presumably most, if not all, trust lands would qualify as "reservations." In turn, all of those parcels could be used in the manner in which the Wyandotte Tribe seeks to use the Huron Cemetery and its surrounding tracts.

Applying what we believe to be the proper definition of the term "reservation" for purposes of IGRA to the facts of this case, it is apparent that the Huron Cemetery does not fall within that definition. Although the Huron Cemetery was reserved by the federal government in the

1855 treaty, it is uncontroverted that the reservation was made strictly for purposes of preserving the tract's status as a burial ground.[15] It is further uncontroverted that, since the time of the 1855 treaty, the Huron Cemetery has not been used by the Wyandotte Tribe for purposes of residence. Rather, the tract, which is now separated by a significant distance from the actual reservation of the Wyandotte Tribe in Oklahoma, has consistently maintained its character as a public burial ground.

For these reasons, we conclude the Secretary's determination that the Huron Cemetery is a "reservation" for purposes of IGRA, and his resulting determination that the Shriner Tract can be used by the Wyandotte Tribe for gaming purposes under the IGRA (25 U.S.C. § 2719(a)(1)), was incorrect. As the Secretary correctly points out in his brief, these determinations are separate and distinct from whether he was required by Pub. L. 98-602 to acquire the Shriner Tract. Thus, our disagreement with these determinations of the Secretary does not necessarily negate the acquisition itself.

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[15] At oral argument, there was some discussion concerning whether the language of the 1855 treaty may have allowed the Wyandotte Tribe to retain title to the Huron Cemetery. We find no support for such a conclusion. If the intent of the 1855 treaty was to allow the Wyandotte Tribe to retain title to the Huron Cemetery, there would have been no need to specify its intended use. In other words, if the Wyandottes had retained title, they could have done with the tract as they wished, and there would have been no need to outline the intended use in the 1855 treaty. In any event, we note the courts and Congress have consistently read the 1855 treaty as transferring title to the Huron Cemetery to the federal government.

IV.

The following is a summary of our holdings. The district court erred in dismissing this action on the grounds that the Wyandotte Tribe was a necessary and indispensable party under Fed. R. Civ. P. 19. We therefore REVERSE the judgment of the district court dismissing this action. With respect to the Secretary's acquisition of the Shriner Tract in trust for the Wyandotte Tribe, we conclude that Pub. L. 98-602 precluded the normal discretion afforded the Secretary by the Indian Reorganization Act regarding land acquisitions. We further agree with the Secretary that, because the acquisition was nondiscretionary, NEPA and NHPA analysis was unnecessary. We conclude, however, that the Secretary's determination that only Pub. L. 98-602 funds were used for the acquisition was not supported by substantial evidence in the record. Finally, we conclude the Huron Cemetery is not a "reservation" for purposes of IGRA. We therefore REMAND the case with directions to the district court to enter partial judgment consistent with our holdings, and to REMAND in part to the Secretary for further consideration of the question of whether Pub. L. 98-602 funds were used for the acquisition of the Shriner Tract.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SAC AND FOX NATION OF MISSOURI, IOWA TRIBE OF KANSAS AND NEBRASKA, PRAIRIE BAND OF POTAWATOMI INDIANS, and BILL GRAVES, Governor of the State of Kansas, Plaintiffs, vs. BRUCE BABBITT, Secretary of the Interior of the United States, Defendant.	**Case No. 96-4129-RDR**
KICKAPOO TRIBE OF KANSAS, Plaintiff, vs. BRUCE BABBITT, Secretary of the Interior of the United States, et al., Defendants.	**Case No. 96-4130-RDR**

MEMORANDUM AND ORDER

(Filed Mar. 2, 2000)

These long-pending cases concern the decision of the Secretary of the Interior to take .52 acres of land (the "Shriner Tract") into trust on behalf of the Wyandotte Indian Tribe of Oklahoma, purportedly under the mandate of Public Law 98-602, and whether that land is

contiguous to "reservation" land for the purposes of the Indian Gaming Regulation Act, 25 U.S.C. § 2701 *et seq.* The alleged "reservation" land is the Huron Cemetery in Kansas City, Kansas.

The complaints

Case No. 96-4129 was filed by the Sac and Fox Nation of Missouri, the Iowa Tribe of Kansas and Nebraska, the Prairie Band of Potawatomi Indians, and the Governor of the State of Kansas against the Secretary of the Interior of the United States. The Wyandotte Indian Tribe of Oklahoma sought and was granted leave to intervene as a defendant in Case No. 96-4129.

Case No. 96-4130 was filed by the Kickapoo Tribe in Kansas and other plaintiffs, who have since been dismissed, against the Secretary of the Interior, various federal officials, the United States and the Wyandotte Indian Tribe of Oklahoma. The Wyandotte Tribe has since been dismissed from Case No. 96-4130 with the consent of plaintiffs on sovereign immunity grounds.

Plaintiffs in these cases have filed joint briefs asking this court to reverse the decision of the Secretary of the Interior to take the Shriner Tract into trust for the Wyandotte Tribe. Plaintiffs also seek a declaratory judgment that the Huron Cemetery is not a "reservation" of the Wyandotte Tribe. The court shall consider any other claims raised in the complaints as waived.

The underlying concern of the plaintiffs in these cases is that the Wyandotte Tribe will use the Shriner Tract as a location for gambling. Defendants have raised

jurisdictional, procedural and substantive defenses to plaintiffs' claims in their responsive briefs.

Indispensable Party/Sovereign Immunity

The United States and the Wyandotte Tribe have asserted without contradiction that the Wyandotte Tribe is a necessary party to this litigation under FED.R.CIV.P. 19(a). The Wyandotte Tribe clearly has interests in the subjects of these actions which could be impaired if it is not made a party. It is also undisputed that the Wyandotte Tribe is a sovereign entity capable of asserting sovereign immunity. Indeed, the Wyandotte Tribe has been dismissed by agreement for this reason in Case No. 96-4130. As discussed below, the Wyandotte Tribe is an indispensable party under FED.R.CIV.P. 19(b). Therefore, the court shall direct that Case No. 96-4130 be dismissed.

In Case No. 96-4129, it is argued that the Wyandotte Tribe has waived its sovereign immunity claim by voluntarily intervening in the case. Upon a review of the events in this case and the law regarding waiver, the court disagrees.

The complaint in Case No. 96-4129 sought an injunction and other relief against taking the Shriner Tract into trust for the Wyandotte Tribe. This was the predominant focus of the complaint. Plaintiffs also sought a declaratory judgment that the Huron Cemetery was not an Indian reservation and that the Shriner Tract would not be eligible for Indian gaming if purchased by an Indian tribe.

The case was filed on July 12, 1996 and a temporary restraining order against taking the Shriner Tract into trust for the Wyandotte Tribe was immediately requested. The emergency relief was granted and an urgent motion by the Wyandotte Tribe for leave to intervene as a defendant was filed. Although at that time the motion to intervene had not been formally granted, the Wyandotte Tribe was permitted to appeal the temporary restraining order and argue the matter before the Tenth Circuit. The Circuit, after an emergency hearing, dissolved the restraining order at least in part to protect the right of the Tribe to have the property taken in trust against the imminent expiration of the Secretary's prerogative to so acquire the land. The Circuit's order was "subject to the conditions which constitute the law of this case, that the respective rights of the parties to obtain judicial review of all issues which have been raised in the complaint below shall be preserved, including standing of all parties, jurisdiction, compliance by the Secretary with all requirements of law, and the ultimate question of whether gaming shall be permitted on the subject land."[1] Up to this point, sovereign immunity was neither explicitly reserved nor waived by the Wyandotte Tribe.

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[1] On the basis of this language, we reject the defendants' argument that this court does not have jurisdiction to consider the challenge to taking the Shriner Tract into trust. This jurisdictional challenge is based on the Quiet Title Act, 28 U.S.C. § 2409a. We believe that the "law of the case," as established by the Tenth Circuit in the order dissolving the injunction, preserved the right of plaintiffs to challenge taking the Shriner Tract into trust, even if by dissolving the injunction, the Circuit permitted that action to be completed.

In a motion for extension of time to answer filed on June 30, 1996, the Wyandotte Tribe indicated implicitly (not expressly) that it would not assert sovereign immunity in Case No. 96-4129 because monetary damages were not requested in that case, but that it would assert sovereign immunity in Case No. 96-4130 because there monetary damages were alleged. Intervention was formally allowed in an order dated September 3, 1996. No mention was made of waiving or asserting sovereign immunity.

The position of the Wyandotte Tribe seemed unchanged in a motion to dismiss filed September 19, 1996, although the Tribe also argued the sovereign immunity status of the United States as grounds to dismiss the case. The motion was later withdrawn.

On March 5, 1997, when the Wyandotte Tribe filed its answer in Case No. 96-4129, it expressly stated that it had not waived sovereign immunity and that the court therefore lacked jurisdiction.

Later, on October 1, 1997, in opposing plaintiffs' motion for a preliminary injunction, the Wyandotte Tribe specifically asserted that it had not consented to jurisdiction regarding the status of the Huron Cemetery. The Tribe stated: "Plaintiffs do not allege and cannot prove that the Wyandotte consented to jurisdiction of this court for the purpose of litigating claims about 'the status of the Huron Cemetery' or the Wyandotte's right to develop or otherwise use the Huron Cemetery. Absent such consent, this Court does not have jurisdiction to grant the injunction requested."

Express waivers of Eleventh Amendment immunity have been required by various courts, including the Tenth

Circuit. See *Jicarilla Apache Tribe v. Kelly*, 129 F.3d 535, 538 (10th Cir. 1997) (mere appearance in a lawsuit is not sufficient to waive); *Mascheroni v. Board of Regents*, 28 F.3d 1554, 1560 (10th Cir. 1994) (same); *Richardson v. New York State Department of Correctional Service*, 180 F.3d 426, 449 (2nd Cir. 1999) (failing to raise immunity defense until summary judgment motion is not fatal). We believe the rule would be the same in the case of a tribe's waiver of sovereign immunity. See *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) ("Suits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."); *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1263-68 (10th Cir. 1998) (requirement that waiver be clear and unequivocal cannot be flexibly applied based on the parties or the specific facts involved); *Pit River Home and Agricultural Co-op. Association v. U.S.*, 30 F.3d 1088, 1100 (9th Cir. 1994) (any waiver must be unequivocally expressed).

Under the circumstances of this case, we do not believe that, even though the Wyandotte Tribe voluntarily intervened as a defendant, there has been a clear or unequivocal waiver of sovereign immunity as to either taking the Shriner Tract into trust or declaring the Huron Cemetery to be "reservation" land. The absence of a waiver is particularly strong as to the latter issue because the primary relief requested in the complaint and the relief which required the emergency intervention of the Wyandotte Tribe was the injunction against taking the Shriner Tract into trust.[2]

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[2] Part of the result in *Wichita and Affiliated Tribes v. Hodel*, 788 F.2d 765, 773 (D.C.Cir. 1986) is arguably contrary to the

We recognize that we cannot merely assume because the Wyandotte Tribe is a necessary party claiming immunity, that it is also an indispensable party. *Davis v. U.S.*, 192 F.3d 951, 960-61 (10th Cir. 1999). But, we believe equity and good conscience would not allow this matter to proceed without the Wyandotte Tribe as a party. Any judgment against the Wyandotte Tribe in its absence would be extremely prejudicial to its land and economic interests. The court can think of no protective provision in a judgment which would lessen or avoid the prejudice. A judgment issued absent the presence of the Wyandotte Tribe would only lead to litigation attacking the judgment, and thus could be considered inadequate. Finally, there may be an alternative venue for tackling the issues of casino gambling on the Shriner Tract and the status of the Huron Cemetery. Certainly, as will be noted again later, the Secretary has indicated that some statutory considerations may apply to future actions relating to the property. In addition, the negotiation and approval of gaming compacts remains to be done. 25 U.S.C. §§ 2701-21. Even if an alternative venue did not exist, we believe the interest of sovereign immunity is of greater concern. See *Ute Distribution Corp.*, 149 F.3d at 1266 n.8 (the proposition that tribal immunity is waived if a party is otherwise left without a judicial remedy is inconsistent

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holding we make in this case. However, we believe the case is distinguishable because the opinion does not indicate that the tribes that intervened as defendants ever asserted sovereign immunity. Indeed, because the opinion discusses somewhat academically whether the tribes *could* voluntarily waive immunity, we assume the tribes did not assert immunity as a defense.

with Supreme Court precedent); *Pit River Home*, 30 F.3d at 1102-03 (dismissing challenge to ownership of land on similar grounds); see also, *Enterprise Management Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) (quoting 3A James Wm. Moore et al., Moore's Federal Practice, para. 19.15, at 19-226 n. 6 (1984)) ("When . . . a necessary party under Rule 19(a) is immune from suit, 'there is very little room for balancing of other factors' set out in Rule 19(b), because immunity may be viewed as one of those interests as 'compelling by themselves.' ").

In sum, after considering the factors listed in Rule 19(b), the court believes Case No. 96-4129 must be dismissed because in equity and good conscience this case cannot proceed without the Wyandotte Tribe, which has not waived its right to assert sovereign immunity.

Shriner Tract

Even if the Wyandotte Tribe waived its sovereign immunity by intervening as a defendant in the action against taking the Shriner Tract into trust, the court would not grant plaintiffs' prayer for relief on this issue.

Plaintiffs attack the Secretary's determination that he was mandated by the provisions of Pub.L. 98-602 (1984) to take the Shriner Tract into trust. Pub.L. 98-602 provides:

> A sum of $100,000 of such funds [allocated to the Wyandotte Tribe of Oklahoma under the act] shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of such Tribe.

Plaintiffs contend that the mandatory language of the statute does not "require the Secretary to purchase any particular piece of land . . . and does not abrogate the Secretary's obligation to satisfy the requirements of the trust statute, 25 U.S.C. § 465, and regulations, 25 C.F.R. § 151.1 *et seq.*, and to exercise his discretion as required by law in processing any trust application by the Wyandotte of Oklahoma." In other words, while conceding that the statute requires the Secretary to take land into trust, plaintiffs apparently contend the statute gives the Secretary discretion over *what* land is purchased to take into trust.

This awkward construction of the statute is contrary to the well-accepted principles that statutory language must be given its ordinary meaning and that "shall" is imperative or mandatory. See *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999); *U.S. v. Myers*, 106 F.3d 936, 941 (10th Cir.) *cert. denied*, 520 U.S. 1270 (1997). Moreover, the Secretary's construction of the statute is entitled to deference. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984).

Accordingly, if required to decide whether the Secretary was required by law to take the Shriner Tract into trust, the court would answer "yes."

Plaintiffs have also argued that defendant acted in an arbitrary and capricious fashion by failing to scrutinize whether Pub.L. 98-602 funds were actually used to purchase the Shriner Tract. We reject this contention. Upon the record presented to the court, the Secretary appeared to accept the representation of the Wyandotte Tribe that Pub.L. 98-602 funds were being used for the purchase.

Evidence reflecting the Tribe's commitment to use Pub.L. 98-602 funds for the purchase is present in various parts of the record. *E.g.*, Resolution No. 950418A of the Wyandotte Tribe of Oklahoma, Tab 17 of the Administrative Record. Plaintiffs make arguments regarding the actual price of the purchase. But, these arguments do not show that Pub.L. 98-602 funds were not paid to purchase the property. On balance, plaintiffs' arguments do not show that the Secretary ignored the source of the funds for the purchase or that the Secretary clearly erred in deciding that Pub.L. 98- 602 funds were used. Plaintiffs' arguments simply challenge the apparent decision of the Secretary not to look behind the representation of the Tribe that Pub.L. 98-602 funds were used. We do not believe our role is to second-guess how the Secretary carries out his statutory mission as long as he has considered the appropriate factors and his decision is not counter to evidence before the agency. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (1994). Neither condition has been demonstrated by plaintiffs.

NEPA & NHPA

Plaintiffs also assert that the Secretary has failed to comply with the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470 *et seq.*, in taking the Shriner Tract into trust. The Secretary contends that NEPA and NHPA are not applicable because he performed a merely ministerial role, but that the statutes will apply to future actions related to the property.

As noted previously, we agree with the defendants that the Secretary was required by law to take the Shriner Tract into trust; it was a nondiscretionary duty. Accordingly, we find that the NEPA did not apply to this decision. See *American Airlines, Inc. v. Department of Transportation*, 2000 WL 121847 (5th Cir. 2000); *Goos v. Interstate Commerce Commission*, 911 F.2d 1283 (8th Cir. 1990); see also, *Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir. 1988) ("federal" action for purposes of NEPA presupposes authority to exercise discretion over an outcome).

We further agree that, for the same reason, NHPA does not apply to the decision to take the Shriner's Tract into trust. See *Lee v. Thornburgh*, 877 F.2d 1053 (D.C.Cir. 1989) (NHPA does not apply where Congress, not a federal agency, appropriated funds and approved the construction plans for a prison); *U.S. v. 162.60 Acres of Land*, 639 F.2d 299 (5th Cir.) *cert. denied*, 454 U.S. 828 (1981) (the vesting of title is neutral *vis-a-vis* the NHPA and therefore compliance is not a defense to condemnation).

Summation

The court directs that Case Nos. 96-4129 and 96-4130 be dismissed. Case No. 96-4130 must be dismissed because an indispensable party, the Wyandotte Tribe, has been dismissed by agreement on the basis of the Tribe's sovereign immunity. Case No. 96-4129 must be dismissed because an indispensable party, the Wyandotte Tribe, has not expressly waived its sovereign immunity by intervening as a defendant in the action. There are two issues raised in Case No. 96-4129: whether the Shriner Tract

should have been taken into trust and whether the Huron Cemetery is reservation land. The Wyandotte Tribe, which intervened under exigent circumstances, clearly did not waive its immunity regarding the Huron Cemetery claim. As to the Shriner Tract issue, even if waiver was found, the court would hold that taking the Shriner Tract was a nondiscretionary function of the Secretary which did not invoke the provisions of NEPA or NHPA.

The court acknowledges that this holding leaves undecided the Huron Cemetery issue which could be critical to the underlying dispute between the plaintiffs and the Wyandotte Tribe, i.e., whether there is casino-style gambling on the Shriner Tract. However, the court is convinced that the issue can be determined in another judicial forum under different circumstances which do not require a court to ignore settled case law regarding sovereign immunity and the waiver of sovereign immunity.

IT IS SO ORDERED.

Dated this 1st day of March, 2000 at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SAC AND FOX NATION OF MISSOURI, et al., Plaintiffs-Appellants, v. GALE A. NORTON, Secretary of the Interior, et al.; and WYANDOTTE TRIBE OF OKLAHOMA, Defendants-Appellees.	Nos. 00-3063 and 00-3095

ORDER

Filed June 14, 2001

Before, **HENRY**, **BRISCOE**, Circuit Judges, and **JENKINS**, District Judge.*

Appellees' petitions for rehearing are denied.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by: /s/ M. [Illegible]
Deputy Clerk

* The Honorable Bruce S. Jenkins, Senior United States District Judge, District of Utah, sitting by designation.

TREATY WITH THE WYANDOT, 1842.

Mar. 17, 1842. 11 Stat., 581. Proclamation Oct. 5, 1842.

John Tyler, President of the United States of America, by John Johnston, formerly agent for Indian affairs, now a citizen of the State of Ohio, commissioner duly authorized and appointed to treat with the Wyandott Nation of Indians for a cession of all their lands lying and being in the States of Ohio and Michigan; and the duly constituted chiefs, counsellors, and head-men, of the said Wyandott Nation, in full council assembled, on the other part, have entered into the following articles and conditions, viz:

ARTICLE 1. The Wyandott Nation of Indians do hereby cede to the United States all that tract of land situate, lying, and being in the county of Crawford and State of Ohio, commonly known as the residue of the large reserve, being all of their remaining lands within the State of Ohio, and containing one hundred and nine thousand one hundred and forty-four acres, more or less. The said nation also hereby cedes to the United States all their right and title to the Wyandotte Reserve, on both sides of the river Huron, in the State of Michigan, containing four thousand nine hundred and ninety-six acres, be the same more or less, being all the remaining lands claimed or set apart for the use of the Wyandotts within the State of Michigan; and the United States hereby promises to pay the sum of five hundred dollars towards the expenses of removing the Indians of the river Huron to Upper Sandusky, but before the latter clause of this article is binding on the contracting parties, the consent of the head-men of the river Huron Wyandotts is to be had in writing.

ARTICLE 2. In consideration of the foregoing cession, the United States hereby grant to the aforesaid Wyandott Nation a tract of land west of the Mississippi River, to contain one hundred and forty-eight thousand acres, and to be located upon any lands owned by the United States, now set apart, or may in future be set apart for Indian use, and not already assigned to any other tribe or nation.

ARTICLE 3. The United States agree to pay the Wyandott Nation a perpetual annuity of seventeen thousand five hundred dollars in specie, the first payment to be made within the present year, 1842, to enable the nation the more speedily to remove to their new home in the West; this includes all former annuities.

ARTICLE 4. The United States agree to make a permanent provision of five hundred dollars per annum, for the support of a school, to be under the direction of the chiefs, and for no other purpose whatever, the first payment to be made three years hence, and afterwards at the payment of the annuity in each succeeding year.

ARTICLE 5. The United States agree to pay the Wyandotts the full value of their improvements in the country hereby ceded by them in Ohio and Michigan, which valuation shall be made by two persons to be appointed by the President of the United States, who shall be sworn faithfully to do justice to the parties, the amount of such valuation to be paid at any time after the 1st day of April, 1843, as shall be acceptable to the Wyandott chiefs, to meet their arrangements for emigrating.

ARTICLE 6. The United States hereby agree to pay the debts due by members of the Wyandott Nation to citizens of the United States, amounting to twenty-three thousand

eight hundred and sixty dollars, in conformity to a schedule hereto annexed.

ARTICLE 7. The Wyandotts shall be allowed the use and occupancy of their improvements until the 1st of April, 1844, on the condition that they nor any persons claiming or occupying under them by lease or otherwise shall not commit waste or damage on the premises hereby ceded, but this is not to prevent the United States from surveying and selling the land at any time previous to the said 1st day of April, 1844.

ARTICLE 8. The United States engage to provide and support a blacksmith and an assistant blacksmith for the Wyandott Nation, and to furnish annually a sufficient quantity of iron, steel, coal, files, tools, and all other things necessary and proper in such on [sic] establishment, and to erect a suitable shop and house or houses for the residence of the blacksmith and his assistant.

ARTICLE 9. The United States engage to maintain and support a sub-agent and interpreter to reside among the Wyandotts to aid them in the protection of their persons and property, and to manage their intercourse with the Government and citizens of the United States.

ARTICLE 10. The buildings and farm occupied by the mission of the Methodist Episcopal Church shall remain in possession of the present incumbents until the 1st day of April, 1844, and permission is hereby given to harvest and remove the crop of fall-grain which may be then sown.

ARTICLE 11. All persons identified as members of the Wyandott Nation, and their heirs, and who may emigrate

to the west, shall participate equally in the benefits of the annuity, and all other national privileges, and it is expressly understood that those who do not emigrate, and any that may hereafter cease to remain with the nation, will not be entitled to the benefits and privileges aforesaid.

ARTICLE 12. Whereas by the 8th article of the treaty of Miami Rapids of September 29th, 1817, (proclaimed January 4, 1819,) there was granted unto Horonu, or Cherokee Boy, a Wyandott chief, one section of land, to contain six hundred and forty acres; and whereas the said Horonu did during his life-time sell and convey to James Whitaker one quarter-section of said land, containing 160 acres, which sale was confirmed by the President of the United States. The said Horonu died in the month of March, 1826, having by his last will bequeathed the remaining three quarter-sections, containing 480 acres, to Squeendehtee and Sooharress, or Isaac Williams, they being the nearest of kin to the deceased, now to the intent that the purposes of the testator may be fully complied with, it is hereby agreed the 480 acres of land, as aforesaid, shall be immediately sold under the directions of the President of the United States, and the net proceeds, after deducting all expenses, be paid over to the heirs aforesaid.

ARTICLE 13. The chiefs of the Wyandott Nation hereby agree to remove their whole people to the west of the Mississippi River with out any other cost to the United States than the sum of ten thousand dollars; five thousand dollars of which is to be paid the said chiefs when the first detachment of their people sets out on

their journey to the west, and the remaining five thousand dollars on the arrival of the whole nation at the place of their destination in the west.

ARTICLE 14. The United States agree to grant by patent in fee-simple to each of the following-named persons, and their heirs all of whom are Wyandotts by blood or adoption, one section of land of six hundred and forty acres each, out of any lands west of the Missouri River set apart for Indian use, not already claimed or occupied by any person or tribe, viz: Silas Armstrong, John M. Armstrong, Matthew R. Walker, William Walker, Joel Walker, Charles B. Garrett, George Garrett, George J. Clark, Irwin P. Long, Ethan A. Long, Joseph L. Tennery, Robert Robertaile, Jared S. Dawson, Joseph Newell, John T. Walker, Peter D. Clark, James Rankin, Samuel McCulloch, Elliot McCulloch, Isaiah Walker, William M. Tennery, Henry Clay Walker, Ebenezer Z. Reed, and Joel Walker Garrett, and to the following chiefs and councillors one section each: Francis A. Hicks, James Washington, Squeendehtee, Henry Jaques, Tauroonee, Doctor Grey Eyes, George Armstrong, Warpole, John Hicks, Peacock, and George Punch. The lands hereby granted to be selected by the grantees, surveyed and patented at the expense of the United States, but never to be conveyed by them or their heirs without the permission of the President of the United States.

ARTICLE 15. The United States agree to pay to William Walker and Joel Walker, each, the sum of two hundred and fifty dollars, and to John M. Armstrong the sum of one hundred and fifty dollars, for services rendered as interpreters in the progress of the negotiation; and to Warpole, a former chief of the Wyandott Nation, one

hundred and fifty dollars, money expended by him as one of the party who accompanied Joseph McCutchen, a former commissioner of the United States, to the city of Washington in September, 1839.

ARTICLE 16. In the year 1812 the houses, barns, stables, fences, horses, cattle, and hogs, with farming utensils and household furniture, to a large amount, the property of the late William Walker, of Brownstown, in the Territory of Michigan, was destroyed by the enemy while in the occupancy of the United States forces; and by reason of his attachment to the cause of his country, being a native citizen, taken prisoner in early life by the Wyandott Indians, inter-married, and ever afterward living among them, the evidence of all which is ample and conclusive. There is therefore granted unto Catharine Walker, widow of the said William Walker, and to his heirs, the sum of three thousand dollars, in full satisfaction of their claim, to be paid by the United States to her or them after the ratification of this treaty.

ARTICLE 17. There shall be reserved from sale, and forever devoted to public use, two acres of ground as near as can be in a square form, to include the stone meeting-house and burying-ground near to and north of Upper Sandusky, one acre to include the burying-ground on the bank near the council-house at Upper Sandusky, and one-half acre to include the burying-ground on the farm of Silas Armstrong, which several lots of ground shall forever remain open and free to all persons for the purpose of interment and houses of worship, and for no other purposes whatever.

ARTICLE 18. This treaty shall take effect and be obligatory on the contracting parties as soon as the same shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof.

In testimony whereof the said John Johnston, commissioner as aforesaid, and the chiefs and councillors and headmen of the Wyandott nation in open council, at the council-house at Upper Sandusky in the county of Crawford, and the State of Ohio, on the seventeenth day of March, in the year of our Lord one thousand eight hundred and forty-two, have set their names.

[SEAL]
Fran. A. Hicks,
Principal Chief.
James Washington (x)
Squeendehtee (x)
Henry Jaquis (x)

John Johnston.
Tauroon (x)
George Armstrong (x)
Doctor Grey Eyes (x)

Signed in the presence of –

John W. Bear, Sub. Indian Agent
James Rankin, U.S. Interpreter
G. C. Worth
John Cary
Samuel Newell
Stephen Fowler

Charles Graham
John Walker
Chester Wells
I. Duddleson
Andrew Gardner, jur.,
John Justus

We, the undersigned, chiefs and counsellors of the Wyandott nation of Indians, residing in the State of Ohio, and representing also the Wyandotts of the River Huron, in Michigan, do hereby give our free and voluntary

assent to the amendments made by the Senate of the United States on the 17th day of August, one thousand eight hundred and forty-two, to the treaty concluded by us with the United States on the 17th day of March, 1842, the same having been submitted and fully explained to us by John Johnston, commissioner on the part of the United States for that purppose, in full council assembled.

In testimony whereof, we have hereunto set our hands and affixed our seals, respectively, at Upper Sandusky, Ohio, the sixteenth day of September, one thousand eight hundred and forty-two, 1842.

Henry Jacques, Principal Chief this year, his x mark, [L.S.]
James Washington, his x mark, [L.S.]
Doctor Grey Eyes, his x mark, [L.S.]
Geroge Punch, sen., his x mark, [L.S.]
Tauroomee, his x mark, [L.S.]
James Big Tree, his x mark, [L.S.]
Franccis A. Hicks, [L.S.]

In the presence of –

John Johnston, U.S. Commissioner
James Rankin, U.S. Interpreter
John Cary
Joseph Chaffee
James Wheeler, Missionary to the Methodist Episcopal Church, Wyandotts,
William M. Buell
Chas. Graham
H. J. Starr

July 25, 1848.

[No. 19.] – *A Resolution to sanction an Agreement made between the Wyandotts and Delawares for the Purchase of certain Lands by the former, of the latter Tribe of Indians.*

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the agreement, in writing, between the Delaware nation of Indians and the Wyandott nation of Indians, made and entered into on the fourteenth day of December, eighteen hundred and forty-three, for the purchase of certain lands by the latter, of the former tribe of Indians, and which said agreement, in writing, is as follows:

> "WHEREAS, from a long and intimate acquaintance, and the ardent friendship which has for a great many years existed between the Delawares and the Wyandotts, and from a mutual desire that the same feeling shall continue and be more strengthened by becoming near neighbors to each other; therefore the said parties, the Delawares on one side, and the Wyandotts on the other, in full council assembled, have agreed, and do agree, to the following stipulations, to wit: –

ARTICLE 1. The Delaware nation of Indians, residing between the Missouri and Kansas Rivers, being very anxious to have their uncles, the Wyandotts, to settle and reside near them, do hereby donate, grant, and quitclaim forever, to the Wyandott nation, three sections of land, containing six hundred and forty acres each, lying and being situated at the point of the junction of the Missouri and Kansas Rivers.

ARTICLE 2. The Delaware chiefs, for themselves and by the unanimous consent of their people, do hereby cede, grant, quitclaim to the Wyandott nation, and their heirs forever, thirty-six sections of land, each containing six hundred and forty acres, situated between the aforesaid Missouri and Kansas Rivers, and adjoining on the west the aforesaid three donated sections, making in all thirty-nine sections of land, bounded as follows, viz.: Commencing at the point at the junction of the aforesaid Missouri and Kansas Rivers, running west along the Kansas River sufficiently far to include the aforesaid thirty-nine sections; thence running north to the Missouri River; thence down the said river with its meanders to the place of beginning; to be surveyed in as near a square form as the rivers and territory ceded will admit of.

ARTICLE 3. In consideration of the foregoing donation and cession of land, the Wyandott chiefs bind themselves, successors in office, and their people, to pay to the Delaware nation of Indians forty-six thousand and eighty dollars, as follows, viz.: six thousand and eighty dollars to be paid the year eighteen hundred and forty-four, and four thousand dollars annually thereafter for ten years.

ARTICLE 4. It is hereby distinctly understood, between the contracting parties, that the aforesaid agreement shall not be binding or obligatory until the President of the United States shall have approved the same, and caused it to be recorded in the War Department.

In testimony whereof, we, the chiefs and headmen of the Delaware nation, and the chiefs and headmen of the Wyandott nation, have, this fourteenth day of December eighteen hundred and forty-three, set our signatures.

Delaware chiefs.

NAH-KOO-MER, his x mark.
Captain KETCHUM, his x mark.
Captain SUAVEC, his x mark,
JACKENDUTHEN, his x mark.
SAN-KOCK-SA, his x mark.
COCK-I-TO-WA, his x mark,
SA-SAR-SIT-TONA, his x mark,
PEMP-SCAH, his x mark,
NAH-QUE-NON, his x mark,

Wyandotts.

HENRY JACQUIS, his x mark,
JAMES WASHINGTON, his x mark,
MATTHEW PEACOCK, his x mark,
JAMES BIGTREE, his x mark,
GEORGE ARMSTRONG, his x mark,
TAN-ROO-MIE, his x mark,
T. A. HICKS,

Signed in open council in presence of

JONATHAN PHILLIPS, *Sub-agent for the Wyandotts.*
RICHARD W. CUMMINS, *Indian Agent.*
JAMES M. SIMPSON.
CHARLES GRAHAM.
JOEL WALKER, *Secretary of the Wyandott Council.*
HENRY TIBLOW, *Indian Interpreter, Delaware."*

Proviso.

be, and the same is hereby, confirmed: *Provided,* That the Wyandotte Indian nation shall take no better right or interest in and to said lands than is now vested in the Delaware nation of Indians.

APPROVED, July 25, 1848.

TREATY WITH THE WYANDOT, 1850.

Apr. 1, 1850.

9 Stat., 987. Ratified Sept. 24, 1850.
Proclaimed Sept. 30, 1850.

Articles of a convention concluded in the city of Washington, this first day of April, one thousand eight hundred and fifty, by and between Ardavan S. Longhery, commissioner especially appointed by the President of the United States, and the undersigned head chief and deputies of the Wyandot tribe of Indians, duly authorized and empowered to act for their tribe.

WHEREAS, By the treaty of March 17, 1842, between the United States and the Wyandot nation of Indians, then chiefly residing within the limits of the State of Ohio, the said nation of Indians agreed to sell and transfer, and did thereby sell and transfer, to the United States their reservations of land, one hundred and nine thousand acres of which was in the State of Ohio, and Six thousand acres were in the State of Michigan, and to remove to the west of the Mississippi river: And whereas, among other stipulations it was agreed that the United States should convey to said Indians a tract of country for their permanent settlement in the Indian territory west of the Mississippi River, to contain one hundred an [and] forth-eight thousand acres of land: And whereas, The said Indians never did receive the said one hundred and forty-eight thousand acres of land from the United States, but were forced to purchase lands from the Delaware nation of Indians, which purchase was agreed to and ratified by the United States: Now, in order to settle the claim of the Wyandot tribe of Indians to said land, the

United States having appointed A. S. Loughery a commissioner on their part, who, with the undersigned delegates from the Wyandot nation, have agreed to the following treaty:

ARTICLE 1.

The United States, in consideration that the Wyandot nation of Indians shall and do hereby release, relinquish, and give up all claim to the said one hundred and forty-eight thousand acres of land agreed to be assigned and given to them by the treaty of March 17, 1842, hereby stipulate and agree to pay to the said Wyandot tribe of Indians the sum of one hundred and eight-five thousand dollars, being at and after the rate of one dollar and twenty-five cents per acre, in the manner and from following, to wit: One hundred thousand dollars to be invested in United States Stocks, bearing five per cent, interest per annum, which interest shall be paid to them at the time and in the manner in which their present annuities are paid – and for the purpose of enabling the Wyandot Indians to pay and extinguish all their just debts, as well what is not due to the Delawares for the purchase of their lands as to others, the balance of said sum, being the sum of eighty-five thousand dollars, shall be paid to the Wyandot nation, or on their drafts, specifically describing for what the drafts are given.

ARTICLE 2.

All the reasonable expenses attending the negotiation of this treaty, including a reasonable allowance for the expenses of the delegation, signers hereto, in coming to

Washington, whilst hereon the business connected herewith, and in returning to their nation, shall be defrayed by the United States.

In testimony whereof, the said commissioners of the part of the United States, and the said head chief and deputies, delegates on the part of the Wyandot tribe or nation of Indians, have hereunto set their hands, at the city of Washington, D. C., this first day of April, in the year of our Lord eighteen hundred and fifty.

Ardavan S. Loughery, [L.S.]
United States Commissioner.

F. A. Hick, [L.S.]
Geo. J. Clark, [L.S.]
Joel Walker, [L.S.]
William B. Waugh, Secretary.

In presence of –

R. W. Johnson,
James X. MacLanahan
Geo. F. Wood,
James Myer,
A. M. Mitchell,
Jno. G. Camp,
Richard Fields,
S. C. Stambaugh,
Sam. J. Potts.

TREATY WITH THE WYANDOT, 1855.

Jan. 31, 1855.

10 Stat. 1159.
Ratified Feb. 20, 1855.
Proclaimed Mar. 1, 1855.

Articles of agreement and convention made and concluded at the city of Washington on the thirty-first day of January, one thousand eight hundred and fifty-five, by George W. Manypenny, as commissioner on the part of the United States, and the following-named chiefs and delegates of the Wyandott tribe of Indians, viz: Tan-roo-mee, Matthew Mudeator, John Hicks, Silas Armstrong, George J. Clark, and Joel Walker, they being thereto duly authorized by said tribe.

ARTICLE 1. The Wyandott Indians having become sufficiently advanced in civilization, and being desirous of becoming citizens, it is hereby agreed and stipulated, that their organization, and their relations with the United States as an Indian tribe shall be dissolved and terminated on the ratification of this agreement, except so far as the further and temporary continuance of the same may be necessary in the execution of some of the stipulations herein; and from and after the date of such ratification, the said Wyandott Indians, and each and every of them, except as hereinafter provided, shall be deemed, and are hereby declared, to be citizens of the United States, to all intents and purposes; and shall be entitled to all the rights, privileges, and immunities of such citizens; and shall in all respects be subject to the laws of the United States, and of the Territory of Kansas in the same manner as other citizens of said Territory; and the jurisdiction of the United States and of said Territory, shall be extended over the Wyandott country in the same manner

as over other parts of said Territory. But such of the said Indians as may so desire and make application accordingly, to the commissioners hereinafter provided for, shall be exempt from the immediate operation of the preceding provisions, extending citizenship to the Wyandott Indians, and shall have continued to them the assistance and protection of the United States, and an Indian agent in their vicinity, for such a limited period or periods of time, according to the circumstances of the case, as shall be determined by the Commissioner of Indian Affairs; and on the expiration of such period or periods, the said exemption, protection, and assistance shall cease; and said persons shall then, also, become citizens of the United States, with all the rights and privileges, and subject to the obligations, above stated and defined.

ARTICLE 2. The Wyandott Nation hereby cede and relinquish to the United States, all their right, title, and interest in and to the tract of country situate in the fork of the Missouri and Kansas Rivers, which was purchased by them of the Delaware Indians, by an agreement dated the fourteenth day of December, one thousand eight hundred and forty-three, and sanctioned by a joint resolution of Congress approved July twenty-fifth, one thousand eight hundred and forty-eight, the object of which cession, is, that the said lands shall be sub-divided, assigned, and reconveyed, by patent, in fee-simple, in the manner hereinafter provided for, to the individuals and members of the Wyandott Nation, in severalty; except as follows, viz: The Portion now enclosed and used as a public burying-ground, shall be permanently reserved and appropriated for that purpose; two acres, to include the church-building of the Methodist Episcopal Church, and the present

burying-ground connected therewith, are hereby reserved, granted, and conveyed to that church; and two acres, to include the church-building of the Methodist Episcopal church South, are hereby reserved, granted, and conveyed to said church. Four acres, at and adjoining the Wyandott ferry, across and near the mouth of the Kansas River, shall also be reserved, and, together with the rights of the Wyandotts in said ferry shall be sold to the highest bidder, among the Wyandott people, and the proceeds of sale paid over to the Wyandotts. On the payment of purchase-money in full, a good and sufficient title to be secured and conveyed to the purchaser, by patent from the United States.

ARTICLE 3. As soon as practicable after the ratification of this agreement, the United States shall cause the lands ceded in the preceding article to be surveyed into sections, half and quarter sections, to correspond with the public surveys in the Territory of Kansas; and three commissioners shall be appointed – one by the United States, and two by the Wyandott council – whose duty it shall be to cause any additional surveys to be made that may be necessary, and to make a fair and just division and distribution of the said lands among all the individuals and members of the Wyandott tribe; so that those assigned to or for each shall, as nearly as possible, be equal in quantity, and also in value, irrespective of the improvements thereon; and the division and assignment of the lands shall be so made as to include the houses, and, as far as practicable, the other improvements, of each person or family; be in as regular and compact a form as possible, and include those for each separate family all altogether. The judgment and decision of said commissioners, on all

questions connected with the division and assignment of said lands, shall be final.

On the completion of the division and assignment of the lands as aforesaid, said commissioners shall cause a plat and schedule to be made, showing the lands assigned to each family or individual, and the quantity thereof. They shall also make up carefully prepared lists of all the individuals and members of the Wyandott tribe – those of each separate family being arranged together – which lists shall exhibit, separately, first, those families the heads of which the commissioners, after due inquiry and consideration, shall be satisfied are sufficiently intelligent, competent, and prudent to control and manage their affairs and interests, and also all persons without families.

Second, those families the heads of which are not competent and proper persons to be entrusted with their shares of the money, payable under this agreement; and, third, those who are orphans, idiots, or insane. Accurate copies of the lists of the second and third of the above classes, shall be furnished by the commissioners to the Wyandott council; whereupon said council shall proceed to appoint or designate the proper person or persons to be recognized as the representatives of those of the second class, for the purpose of receiving and properly applying the sums of money due to payable to or for them, as hereinafter provided, and also those who are to be entrusted with the guardianship of the individuals of the third class, and the custody and management of their rights and interests; the said acts or proceedings of the council, duly authenticated, to be forwarded to the Commissioner of Indian Affairs, and filed in his office; and the

same shall be annually revised by the said council, until the payment of the last installment of the moneys payable to the Wyandotts, under this agreement, and such change of changes made therein as may, from casualties or otherwise, become necessary; such revisions and changes, duly authenticated, to be communicated to, and subject to the approval of, the Commissioner of Indian Affairs.

The said commissioners shall likewise prepare a list of all such persons and families among the Wyandott people as may apply to the temporarily exempted from citizenship and for continued protection and assistance from the United States and an Indian agent, as provided for in the first article of this agreement. The agent through and by whom such protection and assistance is to be furnished, shall be designated by the Commissioner of Indian Affairs.

The aforesaid plat and schedule, and lists of persons, duly authenticated by the commissioners, shall be forwarded to the Commissioner of Indian Affairs, and filed in his office, and copies of the said plat and schedule, and of the list of persons temporarily exempted from citizenship and entitled to the continued protection and assistance of the United States and an Indian agent, duly attested by the commissioners, shall be filed by them in each of the offices of the secretary of the Territory of Kansas, and the clerk of the county in which the Wyandott lands are situated.

ARTICLE 4. On the receipt, by the Commissioner of Indian Affairs, of the plat and schedule, lists of persons, and of the first proceedings of the Wyandott council, mentioned in the next preceding article, patents shall be

issued by the general Land-Office of the United States, under the advisement of the Commissioner of Indian Affairs, to the individuals of the Wyandott tribe, for the lands severally assigned to them, as provided for in the third article of this agreement, in the following manner, to wit: To those reported by the commissioners to be competent to be entrusted with the control and management of their affairs and interests, the patents shall contain and absolute and unconditional grant in fee-simple; and shall be delivered to them by the Commissioner of Indian Affairs, as soon as they can be prepared and recorded in the General Land-Office, but to those not so competent, the patents shall contain an express condition, that the lands are not to be sold or alienated for a period of five years; and not then, without the express consent of the President of the United States first being obtained; and the said patents may be withheld by the Commissioner of Indian Affairs, so long as, in his judgment, their being so withheld may be made to operate beneficially upon the character and conduct of the individuals entitled to them.

None of the lands to be thus assigned and patented to the Wyandotts, shall be subject to taxation for a period of five years from and after the organization of a State government over the territory where they reside; and those of the incompetent classes shall not be alienaed [sic] or released for a longer period than two years, and shall be exempt from levy, sale, or forfeiture, until otherwise provided by State legislation, with the assent of Congress.

ARTICLE 5. Disinterested persons, not to exceed three, shall be appointed by the Commissioner of Indian

Affairs, to make a just and fair appraisement of the parsonage houses, and other improvements connected therewith, on the Wyandott lands, belonging to the Methodist Episcopal Church, and the Methodist Episcopal Church South, the amounts of which appraisements shall be paid to the said churches, respectively, by the individual or individuals of the Wyandott tribe, to whom the lands on which said houses and improvements are, shall have been assigned under the provisions of this agreement; said payments to be made within a reasonable time, in one or more installments, to be determined by said appraisers; and until made in full, no patent or other evidence of title to the lands so assigned to said individual or individuals, shall be issued or given to them.

ARTICLE 6. The Wyandott Nation hereby relinquish, and release the United States from all their rights and claims to annuity, school moneys, blacksmith establishments, assistance and materials, employment of an agent for their benefit, or any other object or thing, of a national character, and from all the stipulations and guarantees of that character, provided for or contained in former treaties, as well as from any and all other claims or demands whatsoever, as a nation, arising under any treaty or transaction between them and the Government of the United States; in consideration of which release and relinquishment, the United States hereby agree to pay to the Wyandott Nation, the sum of three hundred and eighty thousand dollars, to be equally distributed and paid to all the individuals and members of the said nation, in three annual installments, payable in the months of October, commencing the present year; the shares of the families whose heads the commissioners

shall have decided not to be competent or proper persons to receive the same, and those of orphans, idiots, and insane persons, to be paid to and receipted for by the individuals designated or appointed by the Wyandott council to act as their representatives and guardians.

Such part of the annuity, under the treaty of one thousand eight hundred and forty-two, as shall have accrued, and may remain unpaid, at the date of the payment of the first of the above-mentioned installments, shall then be paid to the Wyandotts, and be in full, and a final discharge of, said annuity.

ARTICLE 7. The sum of one hundred thousand dollars, invested under the treaty of one thousand eight hundred and fifty, together with any accumulation of said principal sum, shall be paid over to the Wyandotts, in like manner with the three hundred and eighty thousand dollars mentioned in the next preceding article; but in two equal annual installments, commencing one year after the payment of the last installment of said above-mentioned sum. In the mean time, the interest on the said invested fund, and on any accumulation thereof, together with the amount which shall be realized from the disposition of the ferry and the land connected therewith, the sale of which is provided for in the second article of this agreement, shall be paid over to the Wyandott council, and applied and expended, by regular appropriation of the legislative committee of the Wyandott Nation, for the support of schools, and for other purposes of a strictly national or public character.

ARTICLE 8. The persons to be included in the apportionment of the lands and money, to be divided and paid

under the provisions of this agreement, shall be such only as are actual members of the Wyandott Nation, their heirs and legal representatives, at the date of the ratification hereof, and as are entitled to share in the property and funds of said nation, according to the laws, usages, and customs thereof.

ARTICLE 9. It is stipulated and agreed, that each of the individuals, to whom reservations were granted by the fourteenth article of the treaty of March seventeenth, one thousand eight hundred and forty-two, or their heirs or legal representatives, shall be permitted to select and locate said reservations, on any Government lands west of the States of Missouri and Iowa, subject to pre-emption and settlement, said reservations to be patented by the United States, in the names of the reservees, as soon as practicable after the selections are made; and the reservees, their heirs or proper representatives, shall have the unrestricted right to sell and convey the same; whenever they may think proper; but, in cases where any of said reservees may not be sufficiently prudent and competent to manage their affairs in a proper manner, which shall be determined by the Wyandott council, or where any of them have died, leaving minor heirs, the said council shall appoint proper and discreet persons to act for such incompetent persons and minor heirs in the sale of the reservations, and the custody and management of the proceeds thereof – the persons so appointed, to have full authority to sell and dispose of the reservations in such cases, and to make and execute a good and valid title thereto.

The selections of said reservations, upon being reported to the surveyor-general of the district in which

they are made, shall be entered upon the township plats, and reported, without delay, to the Commissioner of the General Land-Office, and patents issued to the reservees, accordingly. And any selection of, settlement upon, or claim to, land included in any of said reservations, made by any other person or persons, after the same shall have been selected by the reservees, their heirs or legal representatives, shall be null and void.

ARTICLE 10. It is expressly understood, that all the expenses connected with the subdivision and assignment of the Wyandott lands, as provided for in the third article hereof, or with any other measure or proceeding, which shall be necessary to carry out the provisions of this agreement, shall be borne and defrayed by the Wyandotts, except those of the survey of the lands into sections, half and quarter sections, the issue of the patents, and the employment of the commissioner to be appointed by the United States; which shall be paid by the United States.

ARTICLE 11. This instrument shall be obligatory on the contracting parties whenever the same shall be ratified by the President and the Senate of the United States.

In testimony whereof, the said George W. Manypenny, commissioner as aforesaid, and the said chiefs and delegates of the Wyandott tribe of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

Geo. W. Manypenny,	[L.S.]
Tan-roo-mee, his x mark.	[L.S.]
Mathew Mudeater,	[L.S.]
John Hicks, his x mark.	[L.S.]
Silas Armstrong,	[L.S.]
Geo. J. Clark,	[L.S.]
Joel Walker,	[L.S.]

Executed in presence of –

A. Cumming, superintendent Indian affairs.
Rober S. Neighbors, special agent,
Will P. Ross, Cherokee delegate,
J. T. Cochrane.

CHAP. 3504. – An act making appropriations for the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and seven.

June 21, 1906. [H. R. 15331.]
[Public, No. 258.] 34 Stat., 325.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with various Indian tribes, and in full compensation for all offices the salaries for which are specifically provided for herein for the service of the fiscal year ending June thirtieth, nineteen hundred and seven, namely:

* * *

That the Secretary of the Interior is hereby authorized to sell and convey, under such rules and regulations as he may prescribe, the tract of land located in Kansas City, Kansas, reserved for a public burial ground under a treaty made and concluded with the Wyandotte Tribe of Indians on the thirty-first day of January, eighteen hundred and fifty-five. And authority is hereby conferred upon the Secretary of the Interior to provide for the removal of the remains of persons interred in said burial ground and their reinterment in the Wyandotte Cemetery at Quindaro, Kansas, and to purchase and put in place

appropriate monuments over the remains reinterred in the Quindaro Cemetery. And after the payment of the costs of such removal, as above specified, and the costs incident to the sale of said land, and also after the payment to any of the Wyandotte people, or their legal heirs, of claims for losses sustained by reason of the purchase of the alleged rights of the Wyandotte Tribe in a certain ferry named in said treaty, if, in the opinion of the Secretary of the Interior, such claims or any of them are just and equitable, without regard to the statutes of limitation, the residue of the money derived from said sale shall be paid per capita to the members of the Wyandotte tribe of Indians who were parties to said treaty, their heirs, or legal representatives.[1]

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[1] Conley *v.* Ballinger, 216 U.S., 83; 26 Opp. Atty. Genl., 491.

(cite as: 26 U.S. Op. Atty. Gen. 491)

United States Attorney General

RIGHT OF UNITED STATES TO DISPOSE OF WYANDOTTE CEMETERY, KANSAS CITY, KANS.

February 4, 1908

The fee-simple title to the lands formerly used as a burying groung by the Wyandotte Indians, now located in Kansas City, Kans., and withheld from sale and permanently reserved and appropriated by the treaty of January 31, 1855, as a public burying ground, has always been in the United States, subject to the right of the Indians to use it as a burying ground; and the Indians having abandoned that right, the United States has authority, under the treaties of January 31, 1855 (10 Stat., 1159), and February 23, 1867 (15 Stat., 513), to dispose of such lands for the benefit of the Indians and to convey a good title thereto.

The treaty of 1855 did not dedicate the land in question to 'the general public,' the evident intention of the Indians being to continue the use of such grounds solely for the burial of their own dead.

The SECRETARY OF THE INTERIOR.

SIR:

I have received your letter, requesting my opinion whether, by proceeding under authority of the act of Congress of June 21, 1906 (34 Stat., 325, 348), a good title to the Wyandotte Cemetery located in Kansas City, Kans., can be conveyed.

That act provides:

'That the Secretary of the Interior is hereby authorized to sell and convey, under such rules and regulations as he may prescribe, the tract of land located in Kansas City, Kansas, reserved for a public burial ground under a treaty made and concluded with the Wyandotte tribe of Indians on the thirty-first day of January, eighteen hundred and fifty-five. And authority is hereby conferred upon the Secretary of the Interior to provide for the removal of the remains of persons interred in said burial ground and their reinterment in the Wyandotte Cemetery at Quindaro, Kansas, and to purchase and put in place appropriate monuments over the remains reinterred in the Quindaro Cemetery. And after the payment of the costs of such removal, as above specified, and the costs incident to the sale of said land, and also after the payment to any of the Wyandotte people, or their legal heirs, of claims for losses sustained by reason of the purchase of the alleged rights of the Wyandotte tribe in a certain ferry named in said treaty, if, in the opinion of the Secretary of the Interior, such claims or any of them are just and equitable, without regard to the statutes of limitation, the residue of the money derived from said sale shall be paid per capita to the members of the Wyandotte tribe of Indians who were parties to said treaty, their heirs, or legal representatives.'

You say:

'A committee appointed to carry said provision into effect has appraised the land at $70,000, and has been directed by the Commissioner of Indian Affairs to offer it to the city authorities, and, if refused by them, to

endeavor to make a sale of the property as a whole to private parties.

'The Commissioner has been informed that the city counselor of Kansas City, Kansas, has expressed a doubt as to whether the United States can convey a good title to the cemetery grounds, for the reason that, under the treaty of January 31, 1855 (10 Stat., 1159), the Wyandotte tribe of Indians acquired the legal and equitable title to the land, as well as burial rights in the tract, and that the act of June 21, 1906, does not and can not forfeit or set aside the title of those persons to the property.'

The conflicting theory is suggested in your letter to me that by a treaty of 1855 this land was irrevocably dedicated to the general public as a burying ground. The treaty of January 31, 1855 (10 Stat., 1159), to which you refer provides (section 2), that:

'The Wyandotte Nation hereby cede and relinquish to the United States, all their right, title, and interest in and to the tract of country situate in the fork of the Missouri and Kansas rivers, which was purchased by them of the Delaware Indians, by an agreement dated the fourteenth day of December, one thousand eight hundred and forty-three, and sanctioned by a joint resolution of Congress approved July twenty-fifth, one thousand eight hundred and forty-eight, the object of which decision is, that the said lands shall be subdivided, assigned, and reconveyed, by patent, in fee simple, in the manner hereinafter provided for, to the individuals and members of the Wyandotte Nation, in severalty; except as follows, viz: The portion now enclosed and used as a public burying

ground, shall be permanently reserved and appropriated for that purpose.'

You do not mention, however, a subsequent treaty, of February 23, 1867 (15 Stat., 513), with the Wyandottes, providing inter alia, that:

'Whereas a portion of the Wyandottes, parties to the treaty of one thousand eight hundred and fifty-five, although taking lands in severalty, have sold said lands and are still poor, and have not been compelled to become citizens, but have remained without clearly recognized organization, while others who did become citizens are unfitted for the responsibilities of citizenship; and whereas the Wyandottes, treated with in eighteen hundred and fifty-five, have just claims against the Government, which will enable the portion of their people herein referred to to begin anew a tribal existence: Therefore, it is agreed: * * *

'ART. 13. The United States will set apart for the Wyandottes, for their future home, the land ceded by the Senecas in the first article, to be owned by the said Wyandottes in common * * * . A register of the whole people, resident in Kansas and elsewhere, shall be taken by the agent of the Delawares, under the direction of the Secretary of the Interior, on or before the first of July, one thousand eight hundred and sixty-seven, which shall show the names of all who declare their desire to be and remain Indians, and in a tribal condition, together with incompetents and orphans, as described in the treaty of one thousand eight hundred and fifty-five; and all such persons, and those only, shall hereafter constitute the tribe: Provided, that no one who has heretofore consented

to become a citizen, nor the wife or children of any such person, shall be allowed to become members of the tribe, except by the free consent of the tribe after its new organization, and unless the agent shall certify that such party is, through poverty or incapacity, unfit to continue in the exercise of the responsibilities of citizenship of the United States, and likely to become a public charge.'

From an examination of a letter of the Commissioner of Indian Affairs to the Secretary of the Interior, dated January 17, 1905, the report of the Commissioner for 1869 (pages 33 and 463), and the treaty of 1867, I find that practically the whole of the tribe of 1855 failed to become such resident allottees and citizens as the treaty of 1855 contemplated. They had been and continued to be tribal Indians, and Congress, apparently accepting the actual facts as stronger than the project of the treaty, again recognized them as such Indians. The rights of third parties to their quickly-sold allotments do not seem to have been questioned; but in accordance with the fact, the Government, in and after 1867, recognized and treated with these people as a tribe of Indians, notwithstanding the treaty of 1855, and notwithstanding the tribal powers of government had been for several years latent in the individual members, necessitating a reorganization.

Now, I do not accede to the proposition that the treaty of 1855 dedicated this land to 'the general public.' By it the title to all of the land of the tribe passed to the United States, to be subdivided and reconveyed to the Indians in severalty, 'except as follows, viz, the portion now inclosed and used as public burying ground shall be permanently reserved for that purpose.'

I see no indication in this provision of an intention to dedicate the land to 'the general public.' if, by that phrase, any and everyone, white, black, and Indian be intended. This land had been sold to the Wyandottes by the Delawares, another Indian tribe, who desired them as neighbors (9 Stat., 337), and it was in 1855 an Indian burying ground. No reason is apparent why the Wyandottes, who were expected to reside upon allotments around it, should have expected or intended persons not belonging to their tribe to be buried in this cemetery. Probably the unlikelihood that any strangers would be interred there constituted the only reason why it was not deemed necessary to say explicitly in the treaty that only the Wyandottes should use the cemetery or to qualify the phrase 'public burying ground' by restricting it to their own use. 'A cemetery may be either a public or a private one. The former is used by the general community, or neighborhood, or church, while the latter is used only by the family or a small portion of the community.' (Lay v. United States, 12 Ind., App., 362.)

In my opinion, the Wyandottes in this treaty intended that this 'portion' of their land 'now inclosed and used as a public burying ground' should be 'reserved' for 'that purpose,' that is, for their own burying purposes only. The evident intention was to continue the former use, not to authorize an entirely different one.

If so, the Indians, having long since reorganized and removed to Indian Territory (now Oklahoma), with a few insignificant exceptions, and their title, which, as you point out, was a right of occupancy, having been transferred to the United States by the treaty of 1855, with the stipulation that these lands, then used as a burying

ground, should be permanently 'reserved' and appropriated for that purpose, it would seem that the fee title to this land has always been in the United States, subject, after 1855, to the right of the Wyandottes to use it for the purpose indicated.

I think this right may now be regarded as abandoned, leaving the fee unincumbered and to be disposed of as to the Government may seem just and wise. If, however, the land belongs to the tribe, the Government can freely dispose of it for the benefit of the tribe. (Cherokee Nation v. Hitchcock, 187 U.S., 294.)

It would seem from recitals in the latter of the Commissioner of Indian Affairs, dated January 17, 1905, above mentioned, that 'a majority of the members of the Wyandotte tribe in Indian Territory, present at a regularly called meeting of the tribe, held November 29, 1904, adopted a resolution authorizing the sale of said burying ground.'

I venture to suggest that no harm could be done if you were to secure for the United States or any purchaser a conveyance in the nature of a quitclaim deed from the Wyandottes in Oklahoma, who can probably be induced to give one with practical unanimity, and this measure might tend to remove any doubts as to the title, although I can find no sufficient reason for such doubts.

Respectfully,
CHARLES J. BONAPARTE.

CHAP. 44. – An act repealing the provision of the Indian appropriation act for the fiscal year ending June thirtieth, nineteen hundred and seven, authorizing the sale of a tract of land reserved for a burial ground for the Wyandotte Tribe of Indians in Kansas City, Kansas.

Feb. 13, 1913. [S. 3952.] [Public, No. 371.] 37 Stat., 668.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of an act making appropriations for the current and contingent expenses of the Indian Department for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and seven, approved June twenty-first, nineteen hundred and six, as reads as follows: "That the Secretary of the Interior is hereby authorized to sell and convey, under such rules and regulations as he may prescribe, the tract of land located in Kansas City, Kansas, reserved for a public burial ground under a treaty made and concluded with the Wyandotte Tribe of Indians on the thirty-first day of January, eighteen hundred and fifty-five. And authority is hereby conferred upon the Secretary of the Interior to provide for the removal of the remains of persons interred in said burial ground and their reinterment in the Wyandotte Cemetery at Quindaro, Kansas, and to purchase and put in place appropriate monuments over the remains reinterred in the Quindaro Cemetery. And after the payment of the costs of such removal, as above specified, and the costs incident to the sale of said land, and also after the payment to any of the Wyandotte people, or their legal heirs, of claims for losses sustained by reason of the purchase of the alleged rights of the Wyandotte Tribe in a certain ferry named in

said treaty, if, in the opinion of the Secretary of the Interior, such claims or any of them are just and equitable, without regard to the statutes of limitation, the residue of the money derived from said sale shall be paid per capita to the members of the Wyandotte Tribe of Indians who were parties to said treaty, their heirs, or legal representatives," be, and the same is hereby, repealed.

Approved, February 13, 1913.

CHAP. 468. – An Act Making appropriation for the preservation, improvement, and perpetual care of Huron Cemetery, a burial place of the Wyandotte Indians, in the city of Kansas City, Kansas.

September 8, 1916, [H. R. 10989.] 39 Stat., 844. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the sum of $10,000 or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the preservation and improvement of Huron Cemetery, a tract of land in the city of Kansas City, Kansas, owned by the Government of the United States, the use of which was conveyed by treaty to the Wyandotte Tribe of Indians as a cemetery for the members of said tribe: *Provided,* That the authorities of Kansas City, Kansas, will construct and maintain all necessary retaining or outside walls along all the boundaries of said cemetery abutting on streets.

Approved, September 8, 1916.

Proposed Legislation Authorizing Sale Of Wyandotte Indian Burial Ground In Kansas City, Kansas

M-34987 *October 7, 1947.*

The fee title or ownership of the Wyandotte Indian burial ground in Kansas City, Kansas, is in the United States, subject to the recognized use of the Wyandotte Indian Tribe (Treaty of January 31, 1855 (10 Stat. 1159).

Kansas City, Kansas, has no right in, or title to, the cemetery tract in question. The interest of the City is that of a caretaker, stemming from a contract between it and the Government executed in the year 1918.

Congress may provide for the sale of the cemetery tract, which should be upon the condition that the consent of the Wyandotte Tribe be obtained.

Memorandum:

To: The Secretary.
From: The Acting Solicitor.
Subject: Proposed sale of the Wyandotte Indian burial ground in Kansas City, Kansas.

On August 8, 1947, Mr. Douglas W. McGregor, The Assistant to The Attorney General, transmitted to you a copy of a letter from Representative Errett P. Scrivner concerning the proposed sale of the Wyandotte Indian burial ground in Kansas City, Kansas.[1] Representative Scrivner requestioned the Attorney General's opinion

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[1] This burial ground is also known as the Huron Cemetery and contains two acres.

concerning the right of the United States or the Wyandotte Tribe of Indians to sell the burial ground, and the right, if any, of Kansas City, Kansas, in such property. My views on those questions were requested by Mr. McGregor.

The sale of the tract in question was proposed by the introduction in the last session of Congress of H.R. 3685. By the terms of that bill, the Wyandotte Tribe of Oklahoma[2] through its business committee would be authorized to sell the burial round, subject to the approval of the Secretary of the Interior. Provision is made in the bill for the reinterment of bodies and the distribution per capita of the proceeds of the sale among the members of the Wyandotte Tribe after deduction of the costs incurred in the sale of the land and the removal of bodies to another suitable burial ground. A similar bill was introduced in the Senate during the last Congressional session (S. 1372). This Department recommended the enactment of both bills, provided amendments were made eliminating mandatory requirement of a per capita payment and inserting in lieu thereof a provision permitting the proceeds remaining after the payment of expenses to be used for purposes designated by the tribal governing body

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[2] Originally the Wyandotte Indians (otherwise known as the Hurons) resided in territory within the States of Michigan and Ohio. See Treaties of September 20, 1818 (7 Stat. 180), April 23, 1836 (7 Stat. 502), and March 17, 1842 (11 Stat. 581). They later moved west of the Mississippi River to the country which later became the Territory and the State of Kansas, from which they went to their present home in Oklahoma. See Treaties of January 31, 1855 (10 Stat. 1159), and February 23, 1867 (15 Stat. 513). See also Sen. Rept. 527 on S. 1372 (80th Cong., 1st sess.).

with the approval of the Secretary of the Interior or an official designated by him.[3]

Under date of January 31, 1855, representatives of the United States and the Wyandotte Tribe of Indians negotiated a treaty,[4] ratified by the Senate and the President, by which (Article 2) the Indians ceded and relinquished to the United States all their right, title and interest in certain lands for the purpose of obtaining a reconveyance of such land through patents issued to the individual members of the tribe, excepting the burial ground in question which "shall be permanently reserved and appropriated for that purpose * * * ." An item in the Indian Appropriation Act of June 21, 1906, [5] authorized

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[3] The Senate Public Lands Committee acted on S. 1372 and reported it favorably with the amendment suggested by this Department (Sen. Rept. 527).

[4] 10 Stat. 1159.

[5] 34 Stat. 325, 348. "That the Secretary of the Interior is hereby authorized to sell and convey, under such rules and regulations as he may prescribe, the tract of land located in Kansas City, Kansas, reserved for a public burial ground under a treaty made and concluded with the Wyandotte tribe of Indians on the thirty-first day of January, eighteen hundred and fifty-five. And authority is hereby conferred upon the Secretary of the Interior to provide for the removal of the remains of persons interred in said burial ground and their reinterment in the Wyandotte Cemetery at Quindaro, Kansas, and to purchase and put in place appropriate monuments over the remains reinterred in the Quindaro Cemetery. And after the payment of the costs of such removal, as above specified, and the costs incident to the sale of said land, and also after the payment to any of the Wyandotte people, or their legal heirs, of claims for losses sustained by reason of the purchase of the alleged rights of the Wyandotte tribe in a certain ferry named in said treaty, if,

the Secretary of the Interior to sell the burial ground under such rules and regulations as he might prescribe. A commission to sell the land was appointed, but in view of opposition to a sale by relatives and next of kin of persons interred in the cemetery, Congress on February 13, 1913,[6] repealed that part of the 1906 act which had authorized the sale of the burial ground. Thereafter, Congress appropriated funds for the preservation and improvement of the tract in question[7] and authorized the Secretary of the Interior to pay to the authorities of Kansas City, Kansas, the sum of $1,000 in consideration of the agreement by said authorities of Kansas City, Kansas, the sum of Huron Cemetery.[8]

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in the opinion of the Secretary of the Interior, such claims or any of them are just and equitable, without regard to the statutes of limitation, the residue of the money derived from said sale shall be paid per capita to the members of the Wyandotte tribe of Indians who were parties to said treaty, their heirs, or legal representatives."

[6] 37 Stat. 668.

[7] Act of September 8, 1916 (39 Stat. 844). "That the sum of $10,000, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the preservation and improvement of Huron Cemetery, a tract of land in the city of Kansas City, Kansas, owned by the Government of the United States, the use of which was conveyed by treaty to the Wyandotte Tribe of Indians as a cemetery for the members of said tribe: *Provided*, That the authorities of Kansas City, Kansas, will construct and maintain all necessary retaining or outside walls along all the boundaries of said cemetery abutting on streets."

[8] Act of June 30, 1919 (41 Stat. 3, 13). "That the Secretary of the Interior be, and he is hereby, authorized to pay to the authorities of Kansas City, Kansas, the sum of $1,000 in consideration of the agreement of said authorities forever to

It is clear that Kansas City, Kansas, has no title in, or right to, the cemetery tract. This office is unaware of any view ever having been expressed by that municipality to the effect that it has a claim to the land involved. In fact, the officials of that city attempted to purchase the property after the enactment of the 1906 act, *supra*. The only interest of the city in the cemetery is that of a caretaker, which stems from a contract dated March 20, 1918, approved by this Department on April 17, 1918. That contract or agreement was entered into by officers of this city and representatives of this Department, whereby, in consideration of the payment of $1,000, authorized by the act of June 30, 1919, *supra*, the city agreed to maintain and care for the cemetery forever and to give it police protection.[9] Except for the specific powers granted to the city

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maintain and care for the Huron Cemetery, a tract of land in the city of Kansas City, Kansas, owned by the Government of the United States, as provided in the contract for said purposes with the said city of Kansas City, Kansas, the use of which was conveyed by treaty to the Wyandotte tribe of Indians as a cemetery for members of said tribe, such payment to be made from the $10,000 appropriated for the preservation and improvement of said cemetery by the Act of September 8, 1916 (Thirty-ninth Statutes at Large, page eight hundred and forty-four)."

[9] " * * * the city of Kansas City, Kansas, agrees to forever maintain, care for, preserve the lawns and trim the trees and give the grounds the same and equal attention that it gives its City parks within the main part of the city, and particularly that of Huron Park adjoining said Cemetery; and that the city of Kansas City, Kansas, will furnish police protection equivalent to that furnished for the protection of Huron Park; and furnish all electrical energy free of charge for the maintenance of the electric lights, as provided for in the plans and specifications, maintaining and keeping in place all globes and fixtures, and

under the contract, the city officials have been required to seek further authority from officers of this Department whenever they desired to act with respect to other matters affecting the cemetery.[10]

The ownership and fee title to the cemetery tract are in the United States, subject to the recognized use of the Wyandotte Tribe.[11] It is well settled that the United States

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give said Cemetery any and all care that a park of its nature in the heart of a city should demand."

[10] In a letter written by the Commissioner of Indian Affairs, dated October 28, 1927, approved by the Department on October 31, 1927, the City Attorney of Kansas City was advised of this Department's disapproval of the issuance of a proposed permit to drive over the cemetery. It was also suggested to the City Attorney that matters falling outside the scope of the authority given by the contract of March 20, 1918, should be submitted to the local superintendent. Requests for the interment of bodies in the cemetery were recited as examples which should be referred to and considered by the superintendent.

[11] *Conley v. Ballinger*, 216 U.S. 84 (1910), 26 Op. Atty. Gen. 491 (1908). At the time these three decisions were rendered it was generally understood that the Wyandotte tribe had ceased to exist as a political entity. See Cohen, Handbook of Federal Indian Law, p. 273. While the Attorney General took the view, in 1908, that the right of the tribe could be regarded as abandoned, leaving the fee unencumbered and to be disposed of as to the Government may seem just and wise, the factual circumstances all point to a lack of abandonment. The available records do not purport to disclose in detail what interments were made over the years, but those records do show that the tract in question was being used as a burial ground in 1922. Furthermore, in the year 1934 the local superintendent was advised concerning an inquiry as to whom applications should be made for burial in the cemetery. It was suggested to him that the matter should be taken up with the Wyandotte tribal officials with the view of

has the power to administer, control and to authorize the disposal of tribal property.[12] However, such a power is subject to certain limitations inherent in such a guardianship and to pertinent constitutional restrictions, and does not enable the United States, without the consent of the Indians, to give tribal lands to others or to appropriate them to its own purposes without rendering, or assuming an obligation to render, just compensation for them[13] as that "would not be an exercise of guardianship, but an act of confiscation."[14]

Subject to the limitations and restrictions mentioned above, it is competent, of course, for the Congress to provide for the sale of the Wyandotte Cemetery tract on such terms and conditions as it sees fit to impose. Considerations of good faith would appear to require in any such legislation that the consent of the Wyandotte Tribe be a condition to any such sale. The Wyandotte Indians have adopted a tribal constitution under the Oklahoma

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determining who should issue permits for future burials, as well as the eligibility for such burials and the promulgation of rules and regulations relating to interments. Previously, in 1927, the officials of Kansas City, Kansas, had been informed that any requests for the interment of bodies in the cemetery should be referred to the local superintendent. (fn. 10, *supra.*)

[12] *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902).

[13] See *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 52, 54 (1946); *United States v. Klamath Indians*, 304 U.S. 119, 123 (1938); *Shoshone Tribe of Indians v. United States*, 29 U.S. 476 (1937); *United States v. Creek Nation*, 295 U.S. 103 (1935).

[14] *Shoshone Tribe of Indians v. United States*, page 497; *United States v. Creek Nation*, page 110, supra.

Indian Welfare Act.[15] Pursuant to that act, a corporate charter has also been issued to the Wyandotte Tribe, the provisions of which assure the tribe that none of its properties or assets will be disposed of without its consent or approval. Good faith on the part of the United States requires that this assurance be respected.

FELIX S. COHEN,
Acting Solicitor.

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[15] See Cohen, Handbook of Federal Indian Laws, page 273.

AN ACT

To provide for the termination of Federal supervision over the property of the Wyandotte Tribe of Oklahoma and the individual members thereof, and for other purposes.

August 1, 1956
[S. 3970]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the purpose of this Act is to provide for the termination of Federal supervision over the trust and restricted property of the Wyandotte Tribe of Oklahoma and the individual members thereof, and far a termination of Federal services furnished to such Indians because of their status as Indians.

SEC. 2. For the purposes of this Act:

(a) "Tribe" means the Wyandotte Tribe of Oklahoma.

(b) "Secretary" means the Secretary of the Interior.

(c) "Lands" mean real property, interest therein, or improvement thereon, and include water rights.

(d) "Tribal property" means any real or personal property, or any interest in real or personal property, that belongs to the tribe and either is held by the United States in trust for the tribe or is subject to a restriction against alienation imposed by the United States.

SEC. 3. The tribe shall have a period of six months from the date of this Act in which to prepare and submit to the Secretary as proposed roll of the members of the

tribe living on the date of this Act, which shall be published in the Federal Register. The proposed roll shall be prepared in accordance with eligibility requirements prescribed in the tribe's constitution and bylaws. If the tribe fails to submit such roll within the time specified in this section, the Secretary shall prepare a proposed roll for the tribe, which shall be published in the Federal Register. Any person claiming membership rights in the tribe or an interest in its assets, or a representative of the Secretary on behalf of any such person, may, within sixty days from the date of publication of the proposed roll, file an appeal with the Secretary contesting the inclusion or omission of the name of any person on or from such roll. The secretary shall review such appeals and his decisions thereon shall be final and conclusive. After disposition of all such appeals by the Secretary, the roll of the tribe shall be published in the Federal Register, and such roll shall be final for the purposes of this act.

SEC. 4. Upon publication in the Federal Register of the final roll as provided in section 3 of this Act, the rights or beneficial interests in tribal property of each person whose name appears on the roll shall constitute personal property which may be inherited or bequeathed, but shall not otherwise be subject to alienation or encumbrance before the transfer of title to such tribal property as provided in section 5 of this Act without the approval of the Secretary. Any contract made in violation of this section shall be null and void.

SEC. 5. (a) Upon the request of the tribe, the Secretary is authorized within three years from the date of this Act to transfer to a corporation or other legal entity organized by the tribe in a form satisfactory to the Secretary title to

all or any part of the tribal property, or to transfer to one or more trustee designated by the tribe and approved by the Secretary title to all or any part of such property to be held in trust for management or liquidation purposes under such terms and conditions as may be specified by the tribe and approved by the Secretary, or to distribute pro rata among the members of the tribe all or any part of such property, or to sell all or any part of such property and make a pro rata distribution of the proceeds of sale among the members of the tribe after deducting, in his discretion, reasonable costs of sale and distribution.

(b) Title to any tribal property that is not transferred in accordance with the provisions of subsection (a) of this section shall be transferred by the Secretary to one or more trustees designated by him for the liquidation and distribution of assets among the members of the tribe under such terms and conditions as the Secretary may prescribe: *Provided,* That the trust agreement shall provide for the termination of the trust not more than three years from the date of such transfer unless the term of the trust is extended by order of a judge of a court of record designated in the trust agreement: *Provided further,* That the trust agreement shall provide that at any time before the sale of tribal property by the trustees the tribe may notify the trustees that it elects to retain such property and to transfer title thereto to a corporation, other legal entity, or trustee in accordance with the provisions of subsection (a) of this section, and that the trustees shall transfer title to such property in accordance with the notice from the tribe if it is approved by the Secretary.

(c) Title to the tract of land in Kansas City, Kansas, that was reserved for a public burying ground under

article 2 of the treaty dated January 31, 1855 (10 Stat. 1159), with the Wyandotte Tribe of Indians shall be transferred or sold in accordance with subsections (a) and (b) of this section, and the proceeds from any sale of the land may be used to remove and reinter the remains of persons who are buried there, to move any monuments now located on the graves, and to erect at reasonable cost one appropriate monument dedicated to the memory of the departed members of the Wyandotte Tribe: *Provided*, That if S. 1335 or comparable legislation is enacted by the Eighty-fourth Congress, any sale or transfer of such land shall be deferred until three months after the report required by such legislation has been submitted to Congress, during which time Congress shall decide whether to provide for the sale or disposition of the land on the basis of such report.

(d) The Secretary shall not approve any form of organization pursuant to subsection (a) of this section that provides for the transfer of stock or an undivided share in corporate assets as compensation for the services of agents or attorneys unless such transfer is based upon an appraisal of tribal assets that is satisfactory to the Secretary.

(e) When approving or disapproving the selection of trustees in accordance with the provisions of subsection (a) of this section, the Secretary shall give due regard to the laws of the State of Oklahoma that relate to the selection of trustees.

SEC. 6. (a) The Secretary is authorized and directed to transfer within three years after the date of this Act to each member of the tribe unrestricted title to funds or

other personal property held in trust for such member by the United States.

(b) All restrictions on the sale or encumbrance by the owners of trust or restricted lands that were originally allotted to persons who were at the time of allotment members of the tribe, regardless of whether such owners are themselves members of such tribe, and all restrictions on the sale or encumbrance of trust or restricted land owned by members of the tribe (including allottees, heirs, and devisees, either adult or minor), regardless of where the land is located, are hereby removed three years after the date of this Act and the patents or deeds under which titles are then held shall pass the titles in fee simple subject to any valid encumbrance. The titles to all interests in trust or restricted land acquired by members of the tribe by devise or inheritance three years or more after the date of this Act shall vest in such members in fee simple, subject to any valid encumbrance.

(c) Prior to the time provided in subsection (b) of this section for the removal of restrictions on land owned by more than one member of the tribe, the Secretary may –

(1) upon request of any of the owners made within two years after the date of this Act, partition the land and issue to each owner a patent or deed for his individual share that shall become unrestricted three years from the date of this Act;

(2) upon request of any of the owners and a finding by the Secretary that partition of all or any part of the land is not practicable, cause all

or any part of the land to be sold at not less than the appraised value thereof, and distribute the proceeds of sale to the owners: *Provided*, That any one or more of the owners may elect before a sale to purchase the other interests in the land at not less than the appraised value thereof, and the purchaser shall receive an unrestricted patent or deed to the land; and

(3) if the whereabouts of none of the owners can be ascertained, cause such lands to be sold and deposit the proceeds of sale in the Treasury of the United States for safekeeping.

SEC. 7. (a) The act of June 25, 1910 (36 Stat. 855), the Act of February 14, 1913 (37 Stat. 678), and other Acts amendatory thereto shall not apply to the probate of the trust and restricted property of the members of the tribe who die six months or more after the date of this Act.

(b) The laws of the several States, Territories, possessions, and the District of Columbia with respect to the probate of wills, the determination of heirs, and the administration of decedents' estates shall apply to the individual property of members of the tribe who die six months or more after the date of this Act.

SEC. 8. No property distributed under the provisions of this Act shall at the time of distribution be subject to Federal or State income tax. Following any distribution of property made under the provisions of this Act, such property and any income derived therefrom by the individual, corporation, or other legal entity shall be subject to the same taxes, State and Federal, as in the case of non-Indians: *Provided*, That for the purpose of capital gains or losses the base value of the property shall be the value of

the property when distributed to the individual, corporation, or other legal entity.

SEC. 9. Prior to the transfer of title to, or the removal of restrictions from, property in accordance with the provisions of this Act, the Secretary shall protect the rights of members of the tribe who are minors, non compos mentis, or in the opinion of the Secretary in need of assistance in conducting their affairs by causing the appointment of guardians for such members in courts of competent jurisdiction, or by such other means as he may deem adequate.

SEC. 10. Pending the completion of the property dispositions provided for in this Act, the funds now on deposit or hereafter deposited in the Treasury of the United States to the credit of the tribe shall be available for advance to the tribe, or for expenditure, for such purposes as may be designated by the governing body of the tribe and approved by the Secretary.

SEC. 11. The Secretary shall have authority to execute such patents, deeds, assignments, releases, certificates, contracts, and other instruments as may be necessary or appropriate to carry out the provisions of this Act, or to establish a marketable and recordable title to any property disposed of pursuant to this Act.

SEC. 12. Nothing in this Act shall abrogate any valid lease, permits, license, right-of-way, lien, or other contract heretofore approved. Whenever any such instrument places in or reserves to the Secretary any powers, duties, or other functions with respect to the property subject thereto, the Secretary may transfer such functions, in whole or in part, to any Federal agency with the

consent of such agency, or to a State agency with the consent of such agency and the other party or parties to such instrument.

SEC. 13. (a) Upon removal of Federal restrictions on the property of the tribe and individual members thereof, the Secretary shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to the affairs of the tribe and its members has terminated. Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

(b) Nothing in this Act shall affect the status of the members of the tribe as citizens of the United States.

(c) Prior to the issuance of a proclamation in accordance with the provisions of this section, the Secretary is authorized to undertake, within the limits of available appropriations, a special program of education and training designed to help the members of the tribe to earn a livelihood, to conduct their own affairs, and to assume their responsibilities as citizens without special services because of their status as Indians. Such program may include language training, orientation in non-Indian community customs and living standards, vocational training and related subjects, transportation to the place of training or instruction, and subsistence during the course of

training or instruction. For the purposes of such program, the Secretary is authorized to enter into contracts or agreements with any Federal, State, or local governmental agency, corporation, association, or persons. Nothing in this section shall preclude any Federal agency from undertaking any other programs for the education and training of Indians with funds appropriated to it.

SEC. 14. (a) Effective on the date of the proclamation provided for in section 13 of this Act, the corporate charter issued pursuant to the Act of June 26, 1936 (49 Stat. 1967), as amended, to the Wyandotte Tribe of Oklahoma and ratified by the tribe on July 24, 1937, is hereby revoked.

(b) Effective on the date of the proclamation provided for in section 13 of this Act, all powers of the Secretary or other officer of the United States to take, review, or approve any action under the constitution and bylaws of the tribe are hereby terminated. Any powers conferred upon the tribe by such constitution which are inconsistent with the provisions of this Act are hereby terminated. Such termination shall not affect the power of the tribe to take any action under its constitution and bylaws that is consistent with this Act without the participation of the Secretary or other officer of the United States.

SEC. 15. Nothing in this Act shall affect any claims heretofore filed against the United States by the tribe.

SEC. 16. Nothing in this Act shall abrogate any water rights of a tribe or its members.

SEC. 17. The secretary is authorized to issue rules and regulations necessary to effectuate the purposes of this Act and may in his discretion provide for tribal referendums on matters pertaining to management or disposition of tribal assets.

SEC. 18. All Acts or parts of Acts inconsistent with the Act are hereby repealed insofar as they affect the tribe or its members. The Act of June 26, 1936 (49 Stat. 1967), and the Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378), shall not apply to the tribe and its members after the date of the proclamation provided for in section 3 of this Act.

SEC. 19. If any provision of this Act, or the application thereof, to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved August 1, 1956.

Public Law 95-281
95th Congress

An Act

To reinstate the Modoc, Wyandotte, Peoria, and Ottawa Indian Tribes of Oklahoma as federally supervised and recognized Indian tribes.

May 15, 1978
[S. 661]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) Federal recognition is hereby extended or confirmed with respect to the Wyandotte Indian Tribe of Oklahoma, the Ottawa Indian Tribe of Oklahoma, and the Peoria Indian Tribe of Oklahoma, the provisions of the Acts repealed by subsection (b) of this section not withstanding.

(b) The following Acts are hereby repealed:

(1) the Act of August 1, 1956 (70 Stat. 893; 25 U.S.C. 791-307), relating to the Wyandotte Tribe;

(2) the Act of August 2, 1956 (70 Stat. 937; 25 U.S.C. 821-826), relating to the Peoria Tribe; and

(3) the Act of August 3, 1956 (70 Stat. 963; 25 U.S.C. 841-853), relating to the Ottawa Tribe.

(c) There are hereby reinstated all rights and privileges of each of the tribes described in subsection (a) of this section and their members under Federal treaty, statute, or otherwise which may have been diminished or

lost pursuant to the Act relating to them which is repealed by subsection (b) of this section. Nothing contained in this Act shall diminish any rights or privileges enjoyed by each of such tribes or their members now or prior to enactment of such Act, under Federal treaty, statute, or otherwise, which are not inconsistent with the provision is of this Act.

(d) Except as specifically provided in this Act, nothing contained in this Act shall alter any property rights or obligations, any contractual rights or obligations, including existing fishing rights, or any obligation for taxes already levied.

SEC. 2. (a)(1) The Modoc Indian Tribe of Oklahoma is hereby recognized as a tribe of Indians residing in Oklahoma and the provisions of the Act of June 26, 1936, as amended (49 Stat. 1967; 25 U.S.C. 501-509), are hereby extended to such tribe and its members. The Secretary of the Interior shall promptly offer the said Modoc Tribe assistance to aid them in organizing under section 3 of said Act of June 26, 1936 (25 U.S.C. 503).

(2) The provisions of the Act of August 13, 1954 (68 Stat. 718; 25 U.S.C. 564-564w), hereafter shall not apply to the Modoc Tribe of Oklahoma or its members except for any right to share in the proceeds of any claim against the United States as provided in sections 6(c) and 21 of said Act, as amended (25 U.S.C. 564e and 564t).

(3) The Modoc Indian Tribe of Oklahoma shall consist of those Modoc Indians who are direct lineal descendants of those Modocs removed to Indian territory (now Oklahoma) in November 1873, and who did not return to Klamath, Oregon, pursuant to the Act of March 9, 1909

(35 Stat. 751), as determined by the Secretary of the Interior, and the descendants of such Indians who otherwise meet the membership requirements adopted by the tribe.

(b) The Secretary of the Interior shall promptly offer the Ottawa Tribe of Oklahoma and the Peoria Tribe of Oklahoma assistance to aid them in reorganizing under section 3 of the Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C. 503), which Act is re-extended to them and their members by this Act.

(c) The validity of the organization of the Wyandotte Indian Tribe of Oklahoma under section 3 of the Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C. 503), and the continued application of said Act to such tribe and its members is hereby confirmed.

SEC. 3. (a) It is hereby declared that enactment of this Act fulfills the requirements of the first proviso in section 2 of the Act of January 2, 1975 (88 Stat. 1920, 1921), with respect to the Wyandotte Tribe of Oklahoma, the Ottawa Tribe of Oklahoma, and the Peoria Tribe of Oklahoma.

(b) It is hereby declared that the organization of the Modoc Tribe of Oklahoma as provided in section 3(a) of this Act shall fulfill the requirements of the second proviso in section 2 of the Act of January 2, 1975 (88 Stat. 1920, 1921).

(c) Promptly after organization of the Modoc Tribe of Oklahoma, the Secretary of the Interior shall publish a notice of such fact in the Federal Register including a statement that such organization completes fulfillment of the requirements of the provisos in section 2 of the Act of

January 2, 1975 (88 Stat. 1920, 1921), and that the land described in section 1 of said Act is held in trust by the United States for the eight tribes named in said Act.

SEC. 4. The Wyandotte, Ottawa, Peoria, and Modoc Tribes of Oklahoma and their members shall be entitled to participate in the programs and services provided by the United States to Indians because of their status as Indians, including, but not limited to, those under the Act of November 2, 1921 (42 Stat. 208; 25 U.S.C. 13), and for purposes of the Act of August 16, 1957 (71 Stat. 370; 42 U.S.C. 2005-2005F). The members of such tribes shall be deemed to be Indians for which hospital and medical care was being provided by or at the expense of the Public Health Service on August 16, 1957.

Approved May 15, 1978.

INDIAN TRIBES – RECOGNITION

P.L. 95-281

HERMAN E. TALMADGE,
JAMES W. EASTLAND,
GEORGE MCGOVERN,
JAMES B. ALLEN,
WALTER D. HUDDLESTON,
BOB DOLE,
MILTON R. YOUNG,
CARL T. CURTIS,
Managers on the Part of the Senate.

MODOC, WYANDOTTE, PEORIA, AND OTTAWA INDIAN TRIBES – OKLAHOMA – FEDERAL RECOGNITION

P.L. 95-281, see page 92 Stat. 246

Senate Report (Indian Affairs Committee)
No. 95-574,
Nov. 1, 1977 [To accompany S. 661]

House Report (Interior and
Insular Affairs Committee)
No. 95-1019,
Mar. 30, 1978 [To accompany H.R. 2497]

Cong. Record Vol. 123 (1977)

Cong. Record Vol. 124 (1978)

DATES OF CONSIDERATION AND PASSAGE

Senate November 3, 1977; May 2, 1978

House April 11, 1978

The Senate bill was passed in lieu of the House bill after amending its language to contain the text of the House bill.
The House Report is set out.

HOUSE REPORT NO. 95-1019

[page 1]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 2497) To reinstate the Modoc, Wyandotte, Peoria, and Ottawa Indian Tribes of Oklahoma as federally supervised and recognized Indian tribes, having considered the same report favorably thereon with an amendment and recommend that the bill as amended do pass.

* * *

[page 2]

Purpose

The purpose of H.R. 2497, introduced by Mr. Risenhoover, is to repeal the acts of Congress terminating the Federal recognition of the Ottawa, Peoria, and Wyandotte Indian Tribes of Oklahoma and to restore Federal recognition to such tribes, and to make the act of Congress terminating Federal recognition of the Klamath Tribe inapplicable to the Modoc Indians of Oklahoma and to extend recognition to this band of Indians as an Indian tribe.

Background

The Ottawa, Peoria, and Wyandotte Indians are remnants of once powerful Indian tribes historically located in the Great Lakes region. Under the pressure of settlement of the area, and through a series of treaties with the

United States, their numbers and strength were diminished and they were progressively pushed west and south. In the

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late 1800's, these tribes were settled on small reservations in Indian Territory, in what is now Ottawa County in northeastern Oklahoma. In 1956, Congress enacted three separate statutes terminating Federal recognition and supervision of the three tribes and their members.

The Modoc Indians of Oklahoma are descendants of a tribe of Indians historically located in northern California and southern Oregon. In 1864, the Modoc were placed on the Klamath Reservation in Oregon. However, many refused to stay and returned to their lands in northern California. After the Modoc Ware of 1892, a portion of the tribe was forced to go to the Quapaw Reservation in Oklahoma. When the Klamath Tribe and Reservation was terminated in 1954 by the act of August 13, 1953 (68 Stat. 718), the Modoc Indians of Oklahoma were also terminated.

EXPLANATION

Federal policy with respect to Indians during the 1950's and 1960's was guided by a concept known as termination. It was thought at the time that by terminating the relationship between the United States and the Indian tribes and by removing Federal services, the Indians would be free to manage their affairs on their own without Federal supervision, and that they would

thereby prosper along with the general population. Statistics and experience have since shown this policy to be a failure and the policy was discontinued in the 1960's.

The act of August 13, 1954 (68 Stat. 718) terminated the Federal relationship with the Klamath Tribe which included the Modoc group in Oklahoma. The termination was effective on August 18, 1956.

The act of August 1, 1956 (70 Stat. 893) terminated the Federal relationship with the Wyandotte Tribe, contingent upon the transfer of all tribal assets. Since this transfer has yet to be completed, the Wyandottes are not technically terminated; however, they are not currently receiving Federal services.

The act of August 2, 1956 (70 Stat. 937) provided for the termination of the Federal relationship with the Peoria Tribe to take effect 3 years after enactment to allow the final adjudication on those claims pending before the Indian Claims Commission.

Finally, the act of August 3, 1956 (70 Stat. 963) provided for the termination of the Federal relationship with the Ottawa Tribe to be effective 3 years after enactment.

While examination of statistics on employment, family income, families on public assistance, and housing standards with respect to the members of these tribes does not show a severe socio-economic decline, the record does clearly show that they have not kept pace with their federally recognized Indian neighbors or with the surrounding non-Indian population.

In addition, an examination of the legislative history of the acts terminating these tribes shows that termination took place without a full comprehension of the ramifications among the members of the tribes and over the strong objections of the tribal leaders.

H.R. 2497 would restore these tribes to full participation in the broad range of Federal programs and services made available to Indian tribes and people.

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COMMITTEE AMENDMENT

The committee adopted an amendment, in the nature of a substitute, largely based upon the draft recommended by the Department of the Interior in its report on the legislation. The substitute is not substantially different from H.R. 2497, as introduced, the difference being primarily one of technique. As stated in the departmental report, the substitute "provides more simplified and technically correct procedures for restoration than H.R. 2497."

SECTION-BY-SECTION ANALYSIS

Section 1 restores Federal recognition to the Wyandotte, Ottawa, and Peoria Tribes of Oklahoma; repeals the three acts terminating these tribes; reinstates all rights and privileges lost by the three tribes under any treaty or statutes because of termination, while, at the same time declaring that nothing in the act shall diminish any right or privilege enjoyed by the members now or prior to the act which are not inconsistent with the provisions of this act; and preserves all existing rights and obligations except as specifically provided in the act.

Section 2 provides for the organization of the Modoc Indian Tribe of Oklahoma as an Indian tribe under the provisions of the act of June 26, 1936 (49 Stat. 1967); provides that the provisions of the act terminating the Klamath Tribe of Oregon shall not apply to the Modoc except with respect to sharing in the proceeds of any claim against the United States; and provides that the membership of the Modoc Tribe of Oklahoma shall consist of Modoc Indians who are direct descendants of the Modoc who were removed to Oklahoma in 1873 and did not return to Oregon under the act of March 9, 1909 (35 Stat. 751).

This section also "re-extends" the act of June 26, 1936 to the Ottawa and Peoria Tribes, directs the Secretary of the Interior to assist them in reorganizing under that act, and reconfirms the validity of the Wyandotte organization under the 1936 act.

Section 3 declares that the restoration of the Ottawa, Peoria, and Wyandotte tribes and the organization of the Modoc tribe pursuant to this legislation will satisfy the requirements of the act of January 2, 1975 (88 Stat. 1920) that these tribes be restored to Federal recognition before they can take any interest in the lands conveyed by that act.

Section 4 provides that the members of the Wyandotte, Ottawa, Peoria, and Modoc Tribes shall be eligible to participate in all programs and services provided to Indians because of their status as Indians.

COST AND BUDGET ACT COMPLIANCE

Although H.R. 2497, as recommended, does not specifically authorize any appropriations, its enactment will enable the affected tribes to participate in federally funded programs for which they are not presently eligible. It is estimated that these costs may total approximately $100,000 in the first year after enactment. All such costs, of course, will depend on the needs of the tribes and upon the level of

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funding for Bureau of Indian Affairs programs approved by the Congress. The analysis of the Congressional Budget Office follows:

CONGRESSIONAL BUDGET OFFICE,
U.S. CONGRESS,
Washington, D.C., March 29, 1978.

Hon. MORRIS K. UDALL,

Chairman, Committee on Interior and Insular Affairs, Longworth House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 2497, the Indian Tribal Restoration Act of 1975, a bill which restores Federal recognition to the Wyandotte, Ottawa, Peoria and Modoc Indian Tribes, as ordered reported by the House Committee on Interior and Insular Affairs, March 21, 1978.

Based on this review, it is estimated that the Government will incur a cost of approximately $15,000 to enroll the members of the specified tribes. In addition, this bill would make the tribes eligible for benefits under a

number of discretionary Federal programs. Thus, the relevant Federal agencies can be expected to seek additional funds in order to provide such benefits.

Should the committee so desire, we would be pleased to provide further details on this cost estimate.

Sincerely,

ROBERT A. LEVINE,
(For Alice M. Rivlin, Director).

INFLATIONARY IMPACT STATEMENT

Expenditures occasioned by the enactment of H.R. 2497 should have no significant impact on inflation. The amounts involved would be relatively nominal and will be divided among the tribes in a manner which will concentrate substantial funds in no group or area. In any event, the expenditures will involve programs to enhance the living standards, health and well-being of the members of the tribes which should more than offset any adverse impact on inflation which might occur.

OVERSIGHT STATEMENT

Other than normal oversight responsibilities exercised in conjunction with these legislative operations, no formal oversight hearings were conducted by the committee and no recommendations were submitted to the committee pursuant to rule X, clause 2(b)(2).

COMMITTEE RECOMMENDATION

The Committee on Interior and Insular Affairs, by a voice vote, recommends that the bill, as amended, be enacted.

DEPARTMENTAL REPORT

The report of the Department of the Interior dated July 13, 1977, and recommending language comparable to the amendment recommended by the committee follows:

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U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., July 13, 1977.

Hon. MORRIS K. UDALL,

Chairman, Committee on Interior and Insular Affairs, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This responds to your request for our views on H.R. 2497, a bill to reinstate the Modoc, Wyandotte, Peoria, and Ottawa Indian Tribes of Oklahoma as federally supervised and recognized Indian tribes.

We recommend that H.R. 2497 not be enacted, but that the enclosed draft bill to provide more technically correct procedures be enacted instead.

H.R. 2497 would reinstate the Modoc, Wyandotte, Peoria, and Ottawa Indian Tribes of Oklahoma to Federal recognition and supervision, and entitle such tribes to all rights and privileges accorded to Federally recognized Indian tribes under any Federal treaty or statute. The bill

would also repeal the provisions of law relating to the termination of these four tribes.

The act of August 13, 1954 (68 Stat. 718; 25 U.S.C. 564), directed that the Federal services to and trust relationship with the Modoc Tribe (and the other groups comprising the Klamath Tribe) be terminated within 7 years. The termination became effective on August 18, 1956.

The act of August 1, 1956 (70 Stat. 893; 25 U.S.C. 791), provided for termination of the Federal services to and trust relationship with the Wyandotte Tribe upon the transfer or disposition of all tribal assets. Termination of the Wyandotte. Tribe has not become effective because the Bureau of Indian Affairs has not disposed of a tribal burial tract under the terms of section 5(c) of the act (25 U.S.C. 795(c)).

The act of August 2, 1956 (70 Stat. 937; 25 U.S.C. 821), provided for the termination of the Federal services to and trust relationship with the Peoria Tribe to be effective 3 years after enactment, except that the tribe's charter and the Secretary of the Interior's powers and responsibilities under the tribe's constitution and bylaws were to continue until final adjudication of all the tribe's claims pending before the Indian Claims Commission or the Court of Claims. The last of such claims are dockets number 313, 314-A, 314-B and 338 pending before the Indian Claims Commission.

The act of August 3, 1956 (70 Stat. 963; 25 U.S.C. 841), provided for termination of the Federal services to and the trust relationship with the Ottawa Tribe to be effective 3 years after enactment.

The Wyandotte, Peoria, Ottawa, and Modoc Tribes of Oklahoma were terminated as a result of the termination policy set out in House Congressional Resolution 106 of the 83d Congress (act of August 1, 1953, 67 Stat. B 132). Legislation providing for the termination of the Wyandotte, Peorias, and Ottawas was enacted on 3 consecutive days in August 1956. The Modoc Indians of Oklahoma were terminated that same month pursuant to the 1954 act that terminated the Klamath Tribe of Oregon. The Modoc Tribe of Oklahoma had originally been part of the Oregon Modoc Tribe but in 1873 they were placed on land which later became part of the State of Oklahoma. The

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Modocs of Oklahoma are still part of the Oregon Modoc Tribe, which was incorporated into the Klamath Tribe.

Pursuant to House Congressional Resolution 108, the Department of the interior was directed to establish a priority listing of tribes for whom Federal services were to be ended. Some of the criteria announced by the Department to indicate readiness for termination were (1) the degree of assimilation of a tribe; (2) the economic condition of the tribe indicating a reasonable possibility of livelihood through use of available resources; (3) willingness by the tribe to dispense with Federal aid and guidance; and (4) a willingness and ability of States and communities to provide public services. There is no record indicating that these four Oklahoma tribes met these criteria any more than those tribes who were not terminated. In our judgment, they were among the politically weaker tribes who were not able to effectively resist termination. It is indicative of the lack of genuine concern

shown for their readiness for termination that no hearings were held with regard to enactment of legislation providing for their termination.

All four tribes have adopted resolutions requesting that full Federal recognition be restored to them. The tribes allege that they were coerced by Interior Department representatives who were at that time encouraging tribes to go along with the termination policy. The Peoria and Ottawa Tribes state that they accepted termination on that understanding that their tribal claims before the Indian Claims Commission would be expeditiously settled in exchange for termination. These tribes have further stated that the adult members of the tribes were never given the chance to vote on the termination proposition.

As a result of termination, all four tribes have been hindered in their development by inability to plan for the future. They have lost eligibility to participate in Federal programs for federally recognized Indians. These programs relate to health, education and economic development. The social and economic conditions of these tribes are currently below the poverty level of comparable communities in their surrounding area.

Our support for restoration for these four tribes is based upon the finding that they meet the following criteria: there exists an ongoing, identifiable community of Indians who are members of the formerly recognized tribes or who are their descendants; their communities are located in the vicinity of the former reservations; there exists an available land base which could be taken

in trust and proclaimed a reservation; they have continued to perform self-governing functions, either through elected representatives or in meetings of their general membership; there is wide spread use of their aboriginal language, customs and culture; there has been some deterioration in their socio-economic conditions since termination; and their conditions are more severe than in other adjacent rural areas or in comparable areas within the State.

H.R. 2497 and our proposed substitute bill are designed to restore full Federal recognition and services to these four tribes. Our draft bill does not take any tribal or individually owned land off tax rolls or transfer any land titles to the Federal Government in trust for the tribes or their members. Our draft bill would not address the status of the Modoc Indians of Oregon, but would provide for organization

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of the Oklahoma Modocs under the Oklahoma Indian Welfare act (49 Stat. 1967). Our draft bill provides more simplified and technically correct procedures for restoration than H.R. 2497.

We estimate that BIA program costs under the bill would be approximately $100,000 in the first year after enactment. Appropriations for these programs are authorized under existing law.

Restoration for these four tribes carries the support of the Governor of Oklahoma, officials of the respective communities and the city of Miami, Okla.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely,

CECIL D. ANDRUS,
Secretary

* * *

[LOGO]

United States Department of the Interior

OFFICE OF THE SOLICITOR

MAY 15 1996

Memorandum

To: George T. Skibine, Director, Indian Gaming Management Staff

/s/ Robert T. Anderson

From: Robert T. Anderson, Associate Solicitor, Division of Indian Affairs

Subject: Wyandotte Trust Acquisition Package (Huron Cemetery)

Your [sic] have requested an opinion as to whether land in Kansas City, Kansas that is held in trust for the Wyandotte Tribe of Oklahoma (the Huron Cemetery) is a "reservation" within the meaning of 25 U.S.C. § 2719(a)(1) of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21 (1988). For the reasons set forth below, we conclude that the land is a reservation within the meaning of IGRA.

The land on which the Wyandotte Tribe intends to conduct gaming ("Shriner property") is located in Kansas City, Kansas and is contiguous to tribally-owned trust land known as the "Huron Cemetery." The Huron Cemetery has been continuously held in trust for the Wyandotte Tribe since the Wyandotte treaty of January 31, 1855. 10 Stat. 1159 (1855); *See* Title Status Report dated August 19, 1992, Superintendent of Miami Agency, Bureau of Indian Affairs (on file in our office). In Article 2 of that treaty, the Wyandotte ceded the lands of the Tribe

in Kansas to the United States for subdivision in severalty to the tribal members, except "the portion [then] enclosed and used as a public burying-ground [which was] permanently reserved and appropriated for that purpose." *Id.* In *Conley v. Ballinger*, 216 U.S. 84 (1910), the Supreme Court of the United States considered the status of the Huron Cemetery.[1] Justice Holmes, writing for the Court, stated that "[w]hen they [the tribe] made that grant they excepted this parcel. Therefore it remained, as the whole of the land had been before, in ownership of the United States, subject to the recognized use of the Wyandottes." *Id.* at 90. The Court concluded that "the only rights in and over the cemetery were tribal rights." *Id.* at 91. The Wyandotte Tribe of Oklahoma, therefore, retained the exclusive use and benefit of the Huron Cemetery.

Unlike tribal land which was allotted to individual members, the Cemetery was never allotted but was reserved (held in trust by the United States) for the benefit of the Tribe. The term "Indian reservation" originally meant any land reserved from an Indian cession to the federal government. *See United States v. Winans*, 198 U.S. 371, 378 (1905). Later, the meaning of Indian reservation also referred to land set aside under federal protection, whether by executive order or otherwise, for the residence of tribal Indians, regardless of origin.[2] *See generally*

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[1] *Conley* was substantially followed in the later consolidated cases of *Kansas City, Kansas, et al v. United States et al*, 192 F. Supp. 179, 180 (D. Kans. 1960).

[2] We have avoided adopting an overly-restrictive definition of "Indian reservation," lest the definition exclude well-established Indian lands such as the California Rancherias and the New Mexico Pueblos which were not formal "Indian

F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW at 34-35 (1982 Edition). The Huron Cemetery thus fits within the classic definition of an Indian reservation, since it was "permanently reserved" by the Tribe from its cession of land to the United States. The Huron Cemetery was thus " 'validly set apart for the use of the Indians as such, under the superintendence of the Government.' " *See Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, (1991) (quoting *United States v. John*, 437 U.S. 634 (1978)). While these cases deal with the interpretation of whether land is Indian country as defined by 18 U.S.C. § 1151, they are relevant to the inquiry at hand because they reject the formalistic and narrow analysis necessary to reach a contrary conclusion.

Attorneys for certain tribes located in Kansas and opposed to the transaction presented arguments to my office in support of the claim that the land in question is not a "reservation" within the meaning of the Indian Gaming Regulatory Act. They argue that because the IGRA distinguishes between tribal "trust lands" and "reservations," the Huron Cemetery should not be considered a reservation. That section of IGRA, 25 U.S.C. § 2703(4), does not define the term reservation and does not indicate that it subscribed anything but the normal meaning to the term. Because there is no particular definition, we

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reservations" at the time of their establishment. *See* Act of Jan. 12, 1891, 26 Stat. 712 (patenting lands to the Mission Bands of California Indians); Pueblo Lands Act of 1924, 43 Stat. 636; *see generally United States v. McGowan*, 302 U.S. 535 (1938); *United States v. Pelican*, 232 U.S. 442 (1914).

give the term its usual meaning, *i.e.*, land reserved by a tribe in a cession to the United States.

The Kansas Tribes also argue that the Wyandottes abandoned the property and that therefore it can no longer be considered a reservation. That argument must be rejected since it is well-settled that tribal rights can not be lost by non-use. *See* C. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW at 37-46 (1987). The courts have routinely rejected the notion that tribal land claims, treaty rights, or jurisdictional claims can be lost by non-use, or acquiescence in state jurisdiction. *See, e.g., County of Oneida v. Oneida Indian Nation,* 470 U.S. 226 (1986) (tribal land claim); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658 (1979) (treaty fishing rights); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982) (tribal taxing authority). As Professor Wilkinson points out, "Governments do not lose land title by adverse possession or general statutes of limitation, and legislative powers are not diminished because a government chooses not to exercise them." AMERICAN INDIANS, TIME, AND THE LAW, *supra,* at 45. An additional reason for rejecting such an argument is based on application of the Indian law canon of construction mandating that tribal rights not be considered terminated absent a clear and express action by Congress. *See Menominee Indian Tribe v. United States,* 391 U.S. 404 (1968). Further, in *Decoteau v. District Court,* 420 U.S. 425 (1975), the United States Supreme Court noted that "[t]his Court does not lightly conclude that an Indian reservation has been terminated. '(W)hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress' " (quoting *United*

States v. Celestine, 215 U.S. 278 (1909)). The Court further indicated that it requires that a congressional determination to terminate must "['] be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.' " *Id.* at 444 (quoting *Mattz v. Arnett*, 412 U.S. 481, 505 (1973)). *See also Seymour v. Superintendent*, 368 U.S. 351 (1962); *United States v. Nice*, 241 U.S. 591 (1916). Nothing in the history of the Huron Cemetery trust property indicates that Congress has terminated the trust or modified its status as a tribal reservation. Thus, the Huron Cemetery retains its status as a tribal reservation since Congress has not terminated the reservation status of the cemetery tract.

By the Act of August 1, 1956, 70 Stat. 893, Congress expressed its intent to terminate the federal relationship with the Wyandotte Tribe as well as federal supervision over the trust and restricted property of the Wyandotte Tribe of Oklahoma, including the Huron Cemetery. *See* Act of August 1, 1956, 70 Stat. 893 (Repealed 1978). However, the legislation required the removal of federal restrictions from tribal and individually-owned property before the Secretary would declare that the federal-tribal relationship had terminated. *Id.* at 896. This prerequisite never occurred. In 1978, Congress repealed the termination legislation and *"reinstate[d] the . . . Wyandotte Tribe . . . to federal recognition and supervision, and entitle[d] [the] tribe to all rights and privileges accorded to federally recognized Indian tribes under any federal treaty or statute."* 25 U.S.C. § 861(c) (emphasis added). *See* Letter from Cecil Andrus, Secretary of the Interior, to Congressman Morris K. Udall, Chairman, Committee on Interior and Insular Affairs (July 13, 1977) (on file with Solicitors' Office)

(printed in full in H.R. Rep. No. 1019, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 757). Thus, while the Wyandotte Tribe was never technically terminated, by the Act of May 15, 1978, "[f]ederal recognition [was] . . . extended or confirmed with respect to the Wyandotte Indian Tribe of Oklahoma. . . . " *See* 92 Stat. 246 (codified as 25 U.S.C. § 861 (1978)). Congress thus restored the provision of federal services in 1978 and confirmed the Huron Cemetery's status as land reserved for the Wyandotte Tribe by Treaty, *i.e.*, a reservation. *Id.*

Section 20 of IGRA, 25 U.S.C. § 2719, prohibits gaming on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988. However, Congress made several exceptions to this general prohibition, one of these being for land "located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988." *See* 25 U.S.C. § 2719(a)(1). As indicated above, the Huron Cemetery is a reservation by virtue of its having been reserved to the Tribe in the Wyandotte treaty of January 31, 1855. 10 Stat. 1159 (1855). The Wyandotte's proposed trust acquisition is contiguous to the Tribe's reserved land in Kansas, the Huron Cemetery (the two parcels touch and share a common border). *See* Fee-to-Trust Acquisition Application of the Wyandotte Tribe of Oklahoma at 3, Appendix 14 (On file with the Solicitor's Office). Thus, the Shriner's property is contiguous to the Huron Cemetery which was reserved by and held in trust for the Wyandotte Tribe of Oklahoma. As such, the trust acquisition is excepted from the general prohibition against Indian gaming on trust land acquired after October 17, 1988. 25 U.S.C. § 2719(a)(1).

If you have any further questions, please contact Troy Woodward of my staff at 208-6526.

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United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240

IN REPLY REFER TO:

Indian Gaming Management
MS 2070-MIB

JUN 6 1996

Memorandum

To: Ada E. Deer
Assistant Secretary – Indian Affairs

Through: Deputy Commissioner of Indian Affairs Hilda A. Manuel

From: George T. Skibine /s/ [Illegible]
Director, Indian Gaming Management Staff

Subject: Application of the Wyandotte Tribe of Oklahoma for Trust Acquisition of the Shriner Tract in Kansas City, Kansas

I. INTRODUCTION

By Memorandum dated March 26, 1996, the Muskogee Area Office (MAO) transmitted to the Assistant Secretary – Indian Affairs (AS-IA), the application and supporting documentation of the Wyandotte Tribe of Oklahoma (Tribe) to acquire fee property located in Kansas City, Kansas, in trust for gaming. The Tribe's application and supporting documentation were submitted in accordance with a July 19, 1990 Secretarial Directive, which requires

that all acquisitions for gaming be approved or disapproved by the AS-IA. The documents were referred to the Indian Gaming Management Staff (IGMS). The IGMS has completed its review of the application and the supporting documentation. The findings, analysis, and recommendations of the IGMS are set forth herein for your review and final consideration.

The Tribe's application initially proposed to take four parcels of land located in Kansas City, Kansas, into trust. However, by letter dated April 19, 1996, to the Director, IGMS, Chief Leaford Bearskin indicated that the Tribe only wanted to proceed with the "Shriner" tract at this time (**IGMS Ex. 5**). Therefore, the recommendations herein only pertain to the proposed acquisition of the Shriner tract. The Tribe plans to develop and operate a 50,000 square foot Class II and Class III gaming facility on the Shriner tract which is contiguous to the Tribe's reservation (Huron Cemetery). The Tribe's plans also call for the gaming facility to include such non-gaming amenities as a buffet restaurant, a gourmet restaurant, a snack bar, entertainment lounge and retail sales shops. The Tribe is in the process of finalizing contracts with North American Sports Management, Inc. (NORAM), for the financing and development of the gaming facility.

This memorandum documents the findings of the transaction's compliance with the requirements of Section 20 of the Indian Gaming Regulatory Act (IGRA), and the land acquisition regulations in 25 CFR 151.

II. AUTHORITY

The Tribe is a federally-recognized Indian tribe organized under the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967). The Tribe was initially organized under a constitution and bylaws approved by the AS-IA on July 17, 1937, and ratified by tribal voters on July 24, 1937 pursuant to the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967). The Wyandottes, having been partially terminated from federal supervision by the Act of August 1, 1956 (70 Stat. 893-25 USC 791, 807), were subsequently reinstated as a Federally recognized tribe by the Act of May 15, 1978 (92 Stat. 246). The Tribe has rewritten and updated the original 1937 constitution and bylaws. The revised constitution was approved by the Deputy Assistant Secretary – Indian Affairs on May 30, 1985, and ratified by the Tribal Council on August 21, 1985 **(IGMS Ex. 1)**.

Pursuant to Article V, Section 2(b) of the Wyandotte Revised Constitution, the Business Committee of the Wyandotte Tribe by Resolution No. 950418A dated April 18, 1995 **(Tab 2)** authorizes and directs Chief Bearskin to apply to the federal government (Bureau of Indian Affairs and/or Department of the Interior) to take title to the Kansas City Tract in trust for the use and benefit of the Tribe. The resolution was adopted by a vote of five (5) for and zero (0) against or abstaining.

III. PROPERTY TO BE ACQUIRED

The land to be acquired is described as follows:

> A tract of land in the NW Quarter of Section 10, Township 11, Range 25, Wyandotte County,

> Kansas situated in Kansas City, Kansas and more particularly described as: Beginning at the SW corner of Huron Place, as shown on the recorded Plat of Wyandotte City, in Kansas City, Kansas, thence North 150 feet; thence East 150 feet; thence South 150 feet; thence West 150 feet to the point of beginning, meaning and intending to describe a tract of land 150 feet square in the Southwest corner of Huron Place as shown on the recorded Plat of Wyandotte City, which is marked "Church Lot" thereon, containing .52 acres, more or less.

According to the Appraisal Report dated February 22, 1996, the property has an estimated value of $182,000 **(Tab 3)**. The sale price of the property is not discussed by the Area Director. However, in the above-referenced April 19, 1996, letter, Chief Bearskin indicates that the Tribe will purchase the Shriner tract for $180,000 ($100,000 for the land, and $80,000 for the building).

The above described land is located in downtown Kansas City, Kansas, approximately 220 miles from the Tribe's lands in Ottawa County, Oklahoma. Ottawa County is located in the northeastern corner of the State of Oklahoma. A legal determination has been made that the property to be acquired is contiguous to the Huron Cemetery which is the Tribe's reservation (see discussion below). The property is located between Washington Boulevard and Tauromee Avenue (north and south) and Tenth and Third Streets (east and west). The primary north/south street is Minnesota Avenue and primary east/west street is Seventh Street. The area is primarily utilized by local, state and federal government offices

and other commercial uses (restaurants, banks, offices, and shops).

The Tribe's tribal headquarters are located in Wyandotte, Ottawa County, Oklahoma. The Tribe exercises governmental authority over 209.28 acres of trust land in Oklahoma and 1.95 acres of trust land in Kansas. The Shriner tract which the Tribe proposes to acquire is zoned Central Business District and Limited Business District, well removed from residential neighborhoods. The Tribe anticipates rehabilitating the Shriner's Building located on the tract as part of the development and construction of the proposed tribal gaming facility.

IV. TITLE TO THE PROPERTY

On March 25, 1996, the Field Solicitor's Office, Tulsa, Oklahoma issued a preliminary title opinion for the property **(Tab 7)**. According to comments in the opinion, the title opinion is based on a Commitment for Title Insurance (No. T-169736) dated March 6, 1996, issued by Guarantee Title of Wyandotte Co, Inc. and shows the owner of record to be McCurry Enterprises, Inc. **(IGMS Ex. 3)**. The policy amount is $180,000.

V. COMPLIANCE WITH INDIAN GAMING REGULATORY ACT (IGRA)

The Shriner tract is contiguous to a 1.9 acre parcel of property over which the Tribe exercises jurisdiction (the Huron Cemetery). This property has been held in trust by the United States for the benefit of the Tribe since the Treaty of January 31, 1855. In a memorandum dated February 13, 1996, the Associate Solicitor, Division of

Indian Affairs concluded that the prohibition on gaming on after-acquired trust lands contained in Section 20 of IGRA, 25 U.S.C. § 2719, does not apply in this case because the land is contiguous to the Tribe's existing reservation in Kansas City, Kansas **(Tab 8)**. In a memorandum dated May 15, 1996, the Associate Solicitor, Division of Indian Affairs, confirmed that the Huron Cemetery is a reservation for the Wyandotte Tribe of Oklahoma within the meaning of Section 20(a)(1) of the IGRA **(IGMS Ex. 15)**.

The Tribe does not have a Tribal-State compact with the State of Kansas. The IGRA requires an Indian tribe that wants to conduct casino type ("Class III") gaming on its reservation to negotiate a "compact" with the state in which the reservation is located. 25 U.S.C. 2710 (d)(1)(C). Therefore, the Tribe would be allowed to conduct Class II gaming but would be prohibited from conducting Class III until a compact was negotiated.

The National Indian Gaming Commission (NIGC) has been contacted to confirm whether a management contract has been submitted by the Tribe. The NIGC has not received a management contract to date but the Tribe has indicated they will be submitting a contract.

VI. COMPLIANCE WITH 25 CFR PART 151

The Associate Solicitor's February 13, 1996, memorandum **(Tab 8)** concludes that the Secretary's usual discretion over whether to accept land in trust pursuant to 25 U.S.C. § 465 and implementing regulations in 25 CFR Part 151 has been removed because the Shriner tract will be purchased using Pub. L. 98-602 funds. These funds were

set aside in accordance with Pub. L. 97-371, dated implementing regulations in 25 CFR Part 151 has been removed because the Shriner tract will be purchased using Pub. L. 98-602 funds. These funds were set aside in accordance with Pub. L. 97-371, dated December 20, 1982 **(IGMS Ex. 2)**, and subsequently amended by Pub. L. 98-602, dated October 30, 1984 **(Tab 1)**, to provide that land purchased with $100,000 of the funds "shall be held in trust by the Secretary for the benefit of" the Tribe. In its April 19, 1996 letter, the Tribe indicates that it will purchase the Shriner tract and building located thereon for $180,000 derived from the original $100,000 provided for land acquisition under Pub. L. 98-602, plus accrued interest. In addition, the Tribe by Tribal Resolution No. 950418A **(Tab 2)**, dated April 18, 1995, authorizes the Chief to apply to the Bureau of Indian Affairs to acquire, in trust, the land known as the Kansas City Tract utilizing the authority provided by Public Law 98-602.

Therefore, the only applicable requirements of 25 CFR Part 151 are those items required of the Secretary to satisfy the ministerial act of accepting title to the land in trust for the Tribe.

VII. TWO-PART DETERMINATION UNDER SECTION 20 OF IGRA

Section 20 (a)(1) of IGRA provides that gaming may not be conducted on lands acquired by the Secretary in trust for the benefit of a tribe after October 17, 1988, unless such lands are located within or contiguous to the boundaries of the reservation of the tribe's reservation on October 17, 1988. The Shriner tract is contiguous to the Huron

Cemetery, which has been determined to be part of the Tribe's reservation on October 17, 1988. *See* discussion under Section V, *supra*. Therefore, the Tribe may conduct gaming activities on the Shriner tract after it is acquired into trust.

VIII. REVIEW OF ENVIRONMENTAL DOCUMENTATION

The Associate Solicitor's February 13, 1996, memorandum concludes that the Secretary's nondiscretionary decision to take the land into trust is not properly considered a "major federal action" under the National Environmental Policy Act (NEPA). Consequently, NEPA requirements are not applicable to the trust acquisition, and no Environmental Assessment or Environmental Impact Statement need be completed prior to taking the land into trust.

By memorandum dated April 25, 1996, to the Deputy Commissioner of Indian Affairs, the Acting Area Director, MAO, determined that the proposed acquisition is in compliance with the requirements of any other applicable federal law **(IGMS Ex. 9)**. It is our understanding that the Acting Area Director's determination did not receive legal review and concurrence from the Tulsa Field Solicitor. It is our recommendation that such concurrence be obtained by the Acting Area Director before the land is placed into trust.

The Level I Contaminant Survey made on the Shriner tract in February, 1996, recommends that a Level II Survey be made. However, no Level II survey was included in the application package which was submitted to IGMS

for review. Resolution No. 960226A, adopted by the Business Committee of the Tribe on February 25, 1996, authorizes the substitution of the Tribe as the responsible party to assume full liability for any contamination which may exist on the Shriner tract **(Tab 5)**. In a memorandum dated May 6, 1996, the Associate Solicitor, Division of Indian Affairs concluded that neither the tribal resolution nor the environmental contaminant plan sufficiently address the potential Departmental liability that could result from the trust tract, and recommends that the Tribe, Nations Realty Corporation, and the BIA execute an indemnity agreement to that effect **(IGMS Ex. 13)**. IGMS recommends that you execute and date the attached Indemnity Agreement which has been executed by both the Tribe and Nations Realty.

IX. OTHER REQUIREMENTS

The Shriner tract will be purchased by the Tribe for $180,000 using Pub. L. 98-602 funds. The Secretary will take the property in trust pursuant to the mandatory provision of § 105(b)(1) of Pub. L. 98-602. The MAO must inform the Tribe that the acceptance in trust of the Shriner tract exhausts the land acquisition authority of Pub. L. 98-602, and that subsequent trust acquisitions for the Tribe must be made under other statutory authority.

X. AREA DIRECTOR RECOMMENDATIONS

The Area Director has forwarded the application for action by IGMS without a recommendation.

XI. IGMS RECOMMENDATIONS

Our review indicates that the federal requirements for acquiring land in trust for gaming purposes have been satisfied. It is the recommendation of this office that the Shriner tract be taken into trust for the benefit of the Tribe. We recommend that the MAO be authorized to approve the conveyance document accepting the property in trust for the Tribe subject to any conditions set forth herein, including approval of all title requirements by the Field Solicitor in Tulsa, Oklahoma, execution of the Indemnity Agreement between the BIA, the Tribe, and Nations Realty, Inc., concurrence by the Tulsa field Solicitor in the Acting Area Director determination that this acquisition complies with all applicable federal laws, and expiration of the thirty-day period following the publication in the FEDERAL REGISTER of the notice required in 25 CFR § 151.12.

If you concur with our recommendation to approve the trust acquisition of the Shriner tract, we have attached for your signature a proposed notice of publication in the FEDERAL REGISTER proposing to take the Shriner tract in trust for the Tribe following expiration of the thirty-day waiting period as required pursuant to 25 CFR § 151.12, and a memorandum to the MAO Director authorizing him to proceed with the conveyance to *the United States in trust for the Wyandotte Tribe of Oklahoma,* subject to satisfaction of all title requirements pursuant to 25 CFR § 151.13.

Attachment

bcc: 130 Surname, Chron, Hold, 101A, Bureau RF, SOL-IA, 100, AS-IA BIA:GTSkibine:trw:4/29/96:219-4068:wsc 5/24/96 wp:a:wyandot.mem DiskA:wyandot.mem

Supreme Court, U.S.
FILED
NOV 14 2001
OFFICE OF THE CLERK

No. 01-445

In the Supreme Court of the United States

WYANDOTTE NATION, FKA WYANDOTTE TRIBE OF OKLAHOMA, PETITIONER

v.

SAC AND FOX NATION OF MISSOURI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

JOHN C. CRUDEN
Acting Assistant Attorney General

DAVID C. SHILTON
JEFFREY C. DOBBINS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

12 pp

QUESTION PRESENTED

Whether the court of appeals erred in concluding that the Huron Cemetery in Kansas City, Kansas, is not an Indian "reservation" for purposes of a provision of the Indian Gaming Regulatory Act, 25 U.S.C. 2719(a)(1).

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-37) is reported at 240 F.3d 1250. The opinion of the district court (Pet. App. 38-49) is reported at 92 F. Supp. 2d 1124.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2001. Petitions for rehearing were denied on June 14, 2001 (Pet. App. 50). The petition for a writ of certiorari was filed on September 12, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of the efforts of the Wyandotte Tribe of Oklahoma to open a casino on property located in downtown Kansas City, Kansas. The proposed site of the casino is the so-called Shriner Tract, which was once the site of a Shriner temple. Adjoining the Shriner Tract is the Huron Cemetery. Pet. App. 9, 39-40.

Under an 1855 treaty, the Wyandotte Tribe ceded most of its land in Kansas to the United States, with certain exceptions. One of those exceptions was that "[t]he Portion now enclosed and used as a public burying-ground, shall be permanently reserved and appropriated for that purpose." Pet. App. 66. Since 1855, that "burying ground"—the Huron Cemetery—has been held in trust by the United States for the benefit of the Wyandottes. See *Conley* v. *Ballinger*, 216 U.S. 84, 90 (1910) (addressing ownership of the cemetery).

In 1996, the Wyandottes asked the Secretary of the Interior to take the Shriner Tract into trust for the Tribe. The Tribe informed the Secretary that the Shriner Tract was to be purchased with funds appropriated by an Act of Congress to satisfy an Indian Claims Commission judgment in favor of the Tribe, and argued that the Act mandated that land purchased with such funds be taken into trust by the Secretary. See Act of Oct. 30, 1984, Pub. L. No. 98-602, § 105, 98 Stat. 3151. In July 1996, the Secretary took the Shriner Tract into trust. See Pet. App. 10-12, 131-140.

The Indian Gaming Regulatory Act (IGRA) generally prohibits gaming on land taken into trust after October 17, 1988. 25 U.S.C. 2719(a). But IGRA contains an exception to that prohibition for property

"within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988." 25 U.S.C. 2719(a)(1). Although the main reservation of the Wyandotte Tribe is located in Oklahoma, the Department of the Interior, through an Associate Solicitor, determined that the Huron Cemetery is a "reservation" of the Tribe, because that land was expressly "reserved" from cession under the 1855 treaty. See Pet. App. 124-130. Under that interpretation, the Wyandotte Tribe would be permitted to engage in some gaming, such as bingo, on the adjoining Shriner Tract; in addition, if the Tribe entered into a gaming compact with the State of Kansas, the Tribe could engage in casino gaming there. See 25 U.S.C. 2710; see also 25 U.S.C. 2703(7) (defining class II gaming); 25 U.S.C. 2703(8) (defining class III gaming).

2. The respondent Tribes operate casinos pursuant to tribal-state compacts negotiated in the mid-1990s. In 1996, those Tribes, together with the Governor of Kansas, filed suits to challenge the Secretary's decision to take the Shriner Tract into trust for the Wyandottes and the determination that, because the adjoining Huron Cemetery is a "reservation," the Wyandottes could lawfully conduct gaming on the Shriner Tract.*

The district court dismissed the suits. Pet. App. 38-49. The court held that the Wyandotte Tribe, which had intervened in one of the suits, was an indispensable party that could not be joined without its consent because of sovereign immunity. *Id.* at 40-45. In the

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* The district court consolidated this action with *Kickapoo Tribe of Indians* v. *Deer*, which raised virtually identical questions. The court of appeals considered the two cases together and resolved them on similar grounds. See *Kickapoo Tribe of Indians* v. *Deer*, No. 00-3095, 2001 WL 193810 (10th Cir. Feb 27, 2001).

alternative, the court rejected various challenges to the Secretary's decisions. The court held that the Secretary was obligated to take into trust any real property acquired by the Tribe with funds appropriated under Public Law No. 98-602. *Id.* at 45-47. The court also held that the Secretary's decision to take the Shriner Tract into trust was not subject to analysis under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, or the National Historic Preservation Act of 1966 (NHPA), 16 U.S.C. 470 *et seq.* Pet. App. 47-48. The court declined to decide, however, whether the Huron Cemetery is a "reservation" for purposes of IGRA. *Id.* at 49.

3. The court of appeals reversed. Pet. App. 1-37. First, the court of appeals held that the Wyandotte Tribe was not an indispensable party to the action. Pet. App. 14-19. The court reasoned that the United States could adequately represent the Wyandottes' interest in the case, because the United States and the Tribe shared the same interest in defending the Secretary's decisions. *Id.* at 16-19. The court also noted that the Wyandotte Tribe had participated in the case as an intervenor. *Id.* at 16-17 n.10.

Second, the court of appeals held that the Secretary had a non-discretionary duty to take into trust any real property acquired by the Wyandotte Tribe with funds appropriated under Public Law No. 98-602. Pet. App. 21-24. The court further held that the Secretary reasonably determined that, because he had no discretion whether to take the Shriner Tract into trust, he was not required to review that action under the NEPA or the NHPA. *Id.* at 24-26. The court held, however, that the Secretary's determination that the Shriner Tract was purchased only with funds appropriated under Public Law No. 98-602 was not adequately supported by the

record, and therefore directed that the matter be remanded to the Secretary for further consideration. *Id.* at 26-28.

Finally, the court of appeals held that the Secretary erred in characterizing the Huron Cemetery as a "reservation" of the Wyandotte Tribe for purposes of IGRA. Pet. App. 28-36. After acknowledging that "IGRA does not specifically define the term 'reservation,'" the court declined to defer to the Secretary's construction of the term, reasoning that "neither the Secretary nor the Department of the Interior in general is charged with administering IGRA." *Id.* at 31. Rather, the court concluded that the National Indian Gaming Commission (NIGC), by virtue of its authority to promulgate regulations to implement IGRA, see 25 U.S.C. 2706(b)(10), has the authority to interpret any ambiguous terms contained in IGRA. Pet. App. 31. But the court found no indication that the NIGC had spoken to the question. *Id.* at 32.

Accordingly, the court of appeals, examining the matter without deference to the Secretary's views, concluded that Congress used the term "reservation" in IGRA to refer only to "land set aside by the federal government for the occupation of tribal members." Pet. App. 34. The court found support for that construction in IGRA's use of the phrase "*the* reservation of the Indian tribe," 25 U.S.C. 2719(a)(1) (emphasis added), which suggested to the court "that Congress envisioned that each tribe would have only one reservation for gaming purposes." Pet. App. 35. The court also suggested that a broader construction would blur the distinction between reservation lands and trust lands. *Ibid.* Applying its construction, the court concluded that the Huron Cemetery is not a reservation for purposes of IGRA, because it was reserved under the 1855

treaty only as a burial ground, and not as a residence for tribal members. *Id.* at 35-36.

ARGUMENT

The court of appeals' decision does not warrant this Court's review. The decision does not conflict with any decision of this Court or of any other court of appeals. Nor is the court of appeals' construction of the term "reservation" for purposes of 25 U.S.C. 2719(a)(1) likely to have implications for other cases.

1. The court of appeals held, contrary to the views of the Department of the Interior, that the Huron Cemetery is not a "reservation" of the Wyandotte Tribe for purposes of 25 U.S.C. 2719(a)(1). Section 2719(a) generally prohibits tribal gaming on lands, such as the Shriner Tract, that were taken into trust by the Secretary after October 17, 1988. 25 U.S.C. 2719(a). Section 2719(a)(1) creates an exception to that prohibition if "such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988." 25 U.S.C. 2719(a)(1).

The court of appeals construed the phrase "the reservation of the Indian tribe" in Section 2719(a)(1) to refer only to "land set aside by the federal government for the occupation of tribal members." Pet. App. 34. The Department of the Interior construed the statutory reference to "the reservation of the Indian tribe" to encompass *all* lands reserved for a Tribe under a treaty or executive agreement, regardless of the location of the lands relative to the Tribe's principal reservation or the purpose for which the lands were reserved. *Id.* at 124-130; see, *e.g.*, *United States* v. *Pelican*, 232 U.S. 442, 449 (1914) (defining "reservation" as lands "validly set apart for the use of the Indians as such, under the superintendence of the Government"). Under that

definition, drawn from broader principles of Indian law, the Huron Cemetery would qualify as a reservation.

2. Contrary to petitioner's suggestion (see Pet. 10-19), however, the court of appeals' decision does not conflict with any decision of this Court. The court of appeals addressed the definition of "reservation" only as that term is used in IGRA (and, indeed, Section 2719(a)(1) of IGRA). See, *e.g.*, Pet. App. 35 (applying what the court "believe[s] to be the proper definition of the term 'reservation' for purposes of IGRA"); see also *id.* at 36 (rejecting "the Secretary's determination that the Huron Cemetery is a 'reservation' for purposes of IGRA"); *id.* at 37 (concluding that "the Huron Cemetery is not a 'reservation' for purposes of IGRA"). Nothing in the court's decision purports to determine whether the Huron Cemetery is a reservation of the Wyandotte Tribe for other purposes.

The decisions of this Court on which petitioner relies—most of which predate the enactment of IGRA—concern the status of Indian lands in other contexts. See, *e.g.*, *United States* v. *Celestine*, 215 U.S. 278, 285 (1909) ("The word [reservation] is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide."); *Minnesota* v. *Hitchcock*, 185 U.S. 373, 390 (1902) (describing a "reservation" as "a certain defined tract appropriated to certain purposes"); *Spalding* v. *Chandler*, 160 U.S. 394, 403 (1896) (establishment of a reservation gave a Tribe "the right to possess and occupy the lands for the uses and purposes designated"); cf. *Conley* v. *Ballinger*, 216 U.S. 84, 90 (1910) (describing the Huron Cemetery after the 1855 treaty as "remain[ing] * * * in the ownership of

the United States, subject to the recognized use of the Wyandottes"). Those decisions are thus easily reconcilable with the decision below. Petitioner does not suggest any conflict with a decision of any other court of appeals.

3. Moreover, the court of appeals' decision is unlikely to have any application beyond this case. The decision is confined to disputes about the reservation status under IGRA of lands, such as the Huron Cemetery, that are not contiguous to a Tribe's principal reservation *and* that were originally set aside, and subsequently used, solely for purposes other than providing a home for tribal members. Although there are a number of non-contiguous pieces of Indian land that the Secretary of the Interior considers to be reservations, the unusual combination of facts in this case will limit the practical effect of the court of appeals' decision.

Finally, in any future cases that present arguably similar questions, the courts' legal analyses may well be affected by a recent Act of Congress, which purports to "clarif[y]" the Secretary's authority to determine reservation status for purposes of IGRA. See Pub. L. No. 107-63, § 134, 115 Stat. 442. Section 134 provides, in pertinent part, that "[t]he authority to determine whether a specific area of land is a 'reservation' for purposes of sections 2701-2721 of title 25, United States Code, was delegated to the Secretary of the Interior on October 17, 1988." Section 134 contains a proviso that gaming is not to be permitted "on the lands described in section 123 of Public Law 106-291," which refers to the Huron Cemetery, and on "any lands contiguous to such lands that have not been taken into trust by the Secretary of the Interior." Section 134 thus appears to confirm the Secretary's authority to determine the reservation status of the Huron Cemetery. Nonetheless,

the question whether the Secretary properly exercised that authority in the particular circumstances of this case does not present a question that warrants the Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JOHN C. CRUDEN
Acting Assistant Attorney General

DAVID C. SHILTON
JEFFREY C. DOBBINS
Attorneys

NOVEMBER 2001

Supreme Court, U.S.
FILED
NOV 14 2001
CLERK

No. 01-445

IN THE

Supreme Court of the United States

THE WYANDOTTE NATION, a federally recognized tribe,

Petitioner,

v.

SAC AND FOX NATION OF MISSOURI, IOWA TRIBE OF KANSAS AND NEBRASKA, PRAIRIE BAND OF POTAWATOMI INDIANS, KICKAPOO TRIBE OF INDIANS AND BILL GRAVES, GOVERNOR OF THE STATE OF KANSAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS

MASON D. MORISSET
Counsel of Record
M. FRANCES AYER
MORISSET, SCHLOSSER, AYER & JOZWIAK
801 Second Avenue, Suite 1115
Seattle, Washington 98104-1509
(206) 386-5200
Counsel for Prairie Band of Potawatomi Indians

(Additional Counsel Listed on Inside Cover)

170648

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

JOHN R. SHORDIKE
TOM WEATHERS
ALEXANDER & KARSHMER
2150 Shattuck Avenue
Suite 725
Berkeley, CA 94704
(510) 841-5056
Counsel for Sac and Fox Nation

BRIAN JOHNSON
OFFICE OF THE ATTORNEY GENERAL
120 SW Tenth Avenue
Second Floor
Topeka, KS 66612
(785) 296-2215
Counsel for Governor Bill Graves

CHARLEY LAMAN
TRIBAL ATTORNEY
TRIBAL ADMINISTRATIVE ANNEX
GOLDFINCH & K-20
P.O. Box 110
Kickapoo Reservation
Indian Country, KS 66439
(785) 486-2131
Counsel for Kickapoo Tribe in Kansas

MARK GUNNISON
PAYNE & JONES
11000 King Street
Suite 200
P.O. Box 25625
Overland Park, KS 66210
(913) 469-4100
Counsel for the Iowa Tribe of Kansas and Nebraska, and Local Counsel for the Prairie Band of Potawatomi and the Sac and Fox Tribe

QUESTION PRESENTED

Whether the Tenth Circuit Court of Appeals correctly determined that a public burying-ground in Kansas City, Kansas, was not a reservation of the Wyandotte Tribe of Oklahoma, as that term is used in the Indian Gaming Regulatory Act.

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Treaty of December 14, 1843, 9 Stat. 337, *reprinted in* 2 Charles J. Kappler, Indian Affairs, *Laws and Treaties* 1048 (1904) 5

Treaty of February 23, 1867, 15 Stat. 513, *reprinted in* 2 Charles J. Kappler, Indian Affairs, *Laws and Treaties* 960-69 (1904) 7

S. Rep. No. 446, 100th Cong., 2nd Sess. 1-2, *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071 25

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STATEMENT OF THE CASE

1. The Nature of the Proceeding.

This case is a dispute between the Wyandotte Tribe of Oklahoma ("Oklahoma Tribe") and certain "Kansas Parties".[1] The Oklahoma Tribe wants to establish a gambling casino adjacent to the historic "Huron Cemetery" in Kansas City, Kansas.

The Kansas Parties are the Governor of Kansas and the four federally-recognized Indian tribes with reservation lands in Kansas.[2] Each Tribe is the beneficial owner of and exercises jurisdiction over its tribal reservation lands in Kansas, which lands are held in trust for the respective Tribes by the United States of America. Each Tribe is party to a compact with the Governor of Kansas, which provides, in pertinent part, that the four Kansas Tribes may conduct Class III Indian gaming in the State of Kansas pursuant to applicable federal and state law.[3]

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1. Note that the Wyandotte Tribe of Oklahoma ("Oklahoma Tribe") now appears to be calling themselves the "Wyandotte Nation." However, there already is a Wyandotte Nation of Kansas, which is incorporated in that state under state law. To avoid confusion with the Wyandotte Nation of Kansas, we will continue to refer to the Oklahoma Tribe by its original name.

2. This case involves the opinion reported in *Sac and Fox Nation of Missouri, et al. v. Norton, et al.*, 240 F.3d 1250 (10th Cir. 2001). The Kickapoo Tribe in Kansas initiated separate but concurrent litigation from that initiated by the Governor and the other three tribes. Both actions were considered concurrently by the Tenth Circuit Court of Appeals, which adopted the opinion issued in *Sac and Fox* for the Kickapoo case. *Kickapoo Tribe v. Deer*, 4 Fed. Appx. 728 (10th Cir. 2001). Petitioner served the Kickapoo Tribe with the petition for writ of *certiorari* herein, and evidently considers the Kickapoo Tribe a party to this appeal.

3. Under certain circumstances, Indian tribes may conduct gaming on their reservations if they enter into compacts with the affected state. 25 U.S.C. § 2710(d). Class III Indian gaming includes such games as pull tabs, Keno and slot machines. 25 U.S.C. § 2703.

In contrast, the Oklahoma Tribe

– has no trust lands in Kansas (other than a recently acquired tract adjacent to the Huron Cemetery, which is part of this controversy and their claimed interest in the Cemetery);

– no members in Kansas;

– no presence in Kansas, and;

– no compact with the State of Kansas to conduct Class III gaming.

The Oklahoma Tribe does have a reservation in Oklahoma. Because of the dim prospects for gaming on their reservation, the Oklahoma Tribe sought various Kansas sites. They attempted to use a tenuous connection to the Huron Cemetery in Kansas to circumvent the requirements of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"), and establish a casino in another state in a location remote from their reservation.

The Huron Cemetery, located in downtown Kansas City, Kansas, is listed on the National Register of Historic Places. It is a federally-owned cemetery containing a number of Indian burials, some in marked graves but most in unmarked graves, and the remains of Union soldiers from the Topeka Battery, 2nd Regiment, Kansas State Militia, who died in the Battle of Westport in 1864. Although some remains (including the remains of Black Union soldiers) were later reinterred in Topeka, some still remain buried in the Cemetery. The Huron Cemetery is located more than 200 miles from the Oklahoma Tribe's reservation in Oklahoma.

This lawsuit began when the Secretary of the Interior ("Secretary") decided to acquire in trust a small tract of land adjacent to the Cemetery for the benefit of the out-of-state Oklahoma Tribe, which wanted to use the land to penetrate

the lucrative Kansas City gambling market. This property contains a defunct "Shrine Temple" and is referred to as the "Shriner Tract." It encompasses approximately one-half acre.

The status of the Cemetery is critical to the status of the Shriner Tract. Only if the Huron Cemetery was a "reservation" of the Oklahoma Tribe on October 17, 1988, can the adjacent Shriner Tract be placed in trust *for gaming purposes* by the Tribe without complying with the state consent requirements of 25 U.S.C. § 2719(b)(1)(A). That statute provides that a tract of land can be taken into trust for gaming only if it is within or adjacent to an existing Indian reservation existing in 1988. If a tract of land is not so situated, then three requirements must be met: 1) consultation with state, local and nearby tribal officials; 2) a determination that a gaming facility on the newly acquired lands would be in the best interest of the tribe and its members and would not be detrimental to the surrounding community; and 3) concurrence of the governor of the affected state to the acquisition. 25 U.S.C. § 2719(b). None of these three requisites was satisfied here. To avoid compliance with these requirements, the Oklahoma Tribe heavily lobbied the Secretary to determine that the Huron Cemetery, adjacent to the Shriner Tract, was a Wyandotte "reservation."

On June 12, 1996, the Bureau of Indian Affairs ("BIA") published a "Notice of Final Agency Determination to Take Land Into Trust" in which it indicated that within "no sooner than 30 days" it would take certain property in Kansas City, Kansas, into trust for the Oklahoma Tribe for gambling. The notice gave no underlying reasoning, offered no supporting facts, and provided no justification as to why the Secretary was taking land in downtown Kansas City into trust for gaming for an Oklahoma tribe whose reservation was over 200 miles away.

Within the 30-day notice window, the Governor of Kansas and the four Kansas Tribes timely filed this lawsuit to stop the acquisition. In their Complaint, the Kansas Parties claimed unlawful exercise of trust authority and violation of IGRA. The Kansas Parties alleged that the final agency action was unwarranted by the facts, contrary to law, and arbitrary and capricious.[4]

2. Relevant History of the Wyandotte Indians and the Huron Cemetery.

To understand the tenuous and remote connection the Oklahoma Tribe has to Kansas City, it is necessary to briefly review the history of the Tribe and the Huron Cemetery. The original 700-member Wyandotte Nation moved to Kansas from Ohio and Michigan in the 1840s, pursuant to the Treaty of March 17, 1842. Treaty of March 17, 1842, 11 Stat. 581, *reprinted in* 2 Charles J. Kappler, Indian Affairs, *Laws and Treaties* 534-37 (1904). In that treaty, the Wyandotte Indians ceded to the United States their remaining lands in Ohio and Michigan in return for certain payments and a 148,000-acre reservation west of the Mississippi River.

Once the Wyandotte Indians moved to Kansas, they were without a reservation as the United States failed to provide the lands promised. To compensate for its breach of the Treaty

4. The Oklahoma Tribe could not simply buy land in Kansas City and build a casino because IGRA prohibits gaming on any land acquired after October 17, 1988, unless that land is located within or adjacent to a reservation that existed as of that date. *See* 25 U.S.C. § 2719(a)(1). Given this restriction, the Oklahoma Tribe has had to fabricate a "reservation" in downtown Kansas City on which or next to which it can build its casino. To achieve this goal, the Oklahoma Tribe hired a lobbyist who convinced the Secretary to declare the Huron Cemetery – an old Indian cemetery in downtown Kansas City – to be part of the Oklahoma Tribe's "reservation." The Cemetery sits 220 miles away from the Oklahoma Tribe's reservation in Ottawa County, Oklahoma. The Oklahoma Tribe then had the Secretary take into trust for gaming .52 acres adjoining the Cemetery.

of March 17, 1842, the United States authorized the Wyandotte Indians to enter into a contract with the Delaware Nation of Indians (then residing in Kansas) to purchase 36 sections of land (23,040 acres), and to receive in donation from the Delaware Nation three additional sections (1,923 acres). Treaty of December 14, 1843, 9 Stat. 337, *reprinted in* 2 Charles J. Kappler, Indian Affairs, *Laws and Treaties* 1048 (1904).

In 1855, the Wyandotte Nation agreed to dissolve and terminate its relations as a tribe with the United States in exchange for individual United States citizenship for its members. Treaty of January 31, 1855, art. 1, 10 Stat. 1159, *reprinted in* 2 Charles J. Kappler, Indian Affairs, *Laws and Treaties* 677-81 (1904). In addition, the Wyandotte Indians agreed to relinquish all former United States treaty obligations granted the former Wyandotte Nation. 1855 Treaty, art. 6, *reprinted in* 2 Kappler at 680. In the Treaty of 1855, the Wyandottes agreed to cede and relinquish their right, title, and interest in and to the land purchased from the Delaware, so that land could be reconveyed to individual members in fee simple. The Wyandottes also agreed that the United States could exclude from the reconveyance process a public burial ground, which is today known as the Huron Cemetery. 1855 Treaty, art. 2, *reprinted in* 2 Kappler at 678.

The entirety of Article 2 of the Treaty of 1855 is critical to understanding the congressional intent of the Treaty:

> The Wyandott Nation hereby cede and relinquish to the United States, *all their right*, title, and interest in and to the tract of country situate in the fork of the Missouri and Kansas Rivers, which was purchased by them of the Delaware Indians, by an agreement dated the fourteenth day of December, one thousand eight hundred and forty-three, and sanctioned by a joint resolution of Congress approved July twenty-fifth,

> one thousand eight hundred and forty-eight, *the object of which cession is, that the said lands shall be subdivided, assigned, and reconveyed, by patent, in fee-simple*, in the manner hereinafter provided for, to the individuals and members of the Wyandott Nation, in severalty; *except as follows, viz*: The portion now enclosed and used as a *public burying-ground, shall be permanently reserved and appropriated for that purpose*; two acres, to include the church-building of the Methodist Episcopal Church, and the present burying-ground connected therewith, are hereby reserved, granted, and conveyed to that church; and two acres, to include the church-building of the Methodist Episcopal Church South, are hereby reserved, granted, and conveyed to said church. Four acres, at and adjoining the Wyandott ferry, across and near the mouth of the Kansas River, shall also be reserved, and, together with the rights of the Wyandotts in said ferry shall be sold to the highest bidder, among the Wyandott people, and the proceeds of sale paid over to the Wyandotts. On the payment of purchase-money in full, a good and sufficient title to be secured and conveyed to the purchaser, by patent from the United States.

1855 Treaty, art. 2, *reprinted in* 2 Kappler at 678 (emphasis added).

Thus, the Treaty provided that the "portion now enclosed and used as a *public burying-ground, shall be permanently reserved and appropriated for that purpose*." (Emphasis added). *Id.* The rest of the ceded Wyandotte lands were to be "subdivided, assigned, and reconveyed by patent, in fee simple, in the manner hereinafter provided for, to the individuals and members of the Wyandott Nation, in severalty." *Id.* No language in the 1855 Treaty stated that the burial ground was to be held or treated by the United States

as an Indian reservation for the Wyandottes as a tribal group who were, through the Treaty, ceasing their tribal existence. The Treaty simply stated that the land was not to be conveyed to individual members but reserved for limited use as a "public burying-ground." *Id.* A *public* burying-ground is obviously not an Indian reservation.

The 1855 Treaty effected a split within the Wyandotte Nation. Pursuant to the Treaty, those Wyandotte Indians who wished to become citizens of the United States relinquished their tribal membership in exchange for national citizenship. However, the Wyandotte Indians who wanted to remain tribal members were allowed to apply for an exemption "from the immediate operation" of the Treaty, that would have "continued to them the assistance and protection of the United States." 1855 Treaty, art. 1, *reprinted in* 2 Kappler at 677.

This latter group, the Petitioner herein, is known today as the Wyandotte Tribe of Oklahoma. They left Kansas and, in 1857, moved to Indian Territory in Oklahoma to live among the Senecas. Ten years later, this group became party to the Treaty with the Senecas and Others, Treaty of February 23, 1867, 15 Stat. 513, *reprinted in* 2 Charles J. Kappler, Indian Affairs, *Laws and Treaties* 960-69 (1904), and were provided by treaty with the United States "their new homes" – land provided to them by the United States and ceded from the Senecas. 1867 Treaty, art. 13, *reprinted in* 2 Kappler at 963.

The other group of Wyandotte Indians, i.e., those that became United States citizens, came to be known as the "Absentee Wyandotte Indians" or, as they prefer, the Wyandottes, and their descendants. They have incorporated under Kansas law as the Wyandotte Nation of Kansas, Inc., and are seeking federal tribal recognition. The Absentee Wyandotte have lived in Kansas since the 1855 Treaty.[5]

5. The Wyandotte Nation of Kansas should not be confused with the Oklahoma petitioner herein, who now also call themselves the "Wyandotte Nation." *See* footnote 1.

Because the 1855 Treaty permanently reserved the Huron Cemetery for sole use as a "public burying-ground" and dissolved the Wyandottes as a tribe, and because the 1867 Treaty with the Senecas was silent as to the Huron Cemetery, there is no historical evidence, no Treaty, and no Act of Congress indicating that the Oklahoma Tribe has any right, title, or interest in the Huron Cemetery as a tribal "reservation." Article 2 of the 1855 Treaty provided for the Wyandottes to cede all their land to the United States for reconveyance in fee simple to individuals but that "[t]he portion now enclosed and used as a public burying-ground, shall be permanently reserved and appropriated for that purpose. . . ." 1855 Treaty, art. 2, *reprinted in* 2 Kappler at 678.

In 1908, the United States Attorney General opined that title to the Huron Cemetery was in the United States, subject to the right of Indians to use the Cemetery as a burial ground. 26 U.S. Op. Atty. Gen. 491 (1908). The Attorney General also found that the Oklahoma Wyandottes had abandoned the Huron Cemetery, having long since reorganized and removed to Indian Territory in Oklahoma. *Id.* at 495. In 1918, the United States and the City of Kansas City, Kansas, entered into a perpetual care contract for maintenance of the public Cemetery stating:

> [T]he City of Kansas City, Kansas, agrees to forever maintain, care for, preserve the lawns and trim the trees and give the grounds the same and equal attention that it gives its City parks within the main part of the city, and particularly that of Huron Park adjoining said Cemetery, and that the city of Kansas City, will furnish police protection equivalent to that furnished for the protection of Huron Park; and furnish all electrical energy free of charge for the maintenance of the electric lights, as provided for in the plans and specifications, maintaining and keeping in place all globes and

> fixtures, and give said Cemetery any and all care that a park of its nature in the heart of a city should demand.

Contract Between the United States of America and the City of Kansas City, Kansas, March 12, 1918.

In *Kansas City, Kansas, et al. v. United States et al.*, 192 F. Supp. 179, 180 (D. Kan. 1960), an action brought by the City of Kansas City to enjoin the United States from selling the Huron Cemetery, the district court concluded that the Wyandottes who moved to Oklahoma after the Treaty of 1855 "do not use [the Huron Cemetery] and since their removal to Oklahoma have not used it. They have no interest in maintaining it as a cemetery." *Id.* at 181.

3. The Oklahoma Tribe's Attempt to Establish Out-of-State Gaming.

As the Tenth Circuit Court of Appeals noted, due to ". . . dim prospects for gaming on its Oklahoma reservation. . . .", the Oklahoma Tribe began attempts to acquire land in Kansas for gaming. *Sac and Fox Nation of Missouri, et al. v. Norton, et al.*, 240 F.3d 1250, 1255 (10th Cir. 2001). After efforts failed to have land located in Park City, Kansas, taken into trust for the purpose of gaming, the Oklahoma Tribe switched its focus to land in downtown Kansas City, Kansas.[6] In the trust application documents, the Tribe argued for the first time that the public Huron Cemetery was its "reservation." The Oklahoma Tribe contended that it was entitled to the former federal courthouse in Kansas City under the excess property statute, arguing that the courthouse was contiguous to its "reservation" (*i.e.*, the Huron Cemetery). The Interior Board of Indian Appeals rejected this argument, finding that the Oklahoma Tribe did not have

6. Department solicitors had informed the Tribe that it would not be able to have the Park City land approved for gaming without complying with the consultation and concurrence requirements of 25 U.S.C. § 2719(b).

an existing reservation in Kansas. *Wyandotte Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs*, IBIA 95-79-A, 28 IBIA 247 (Oct. 25, 1995) [23 Indian Law Rep. 7081]. In so holding, the Board noted: "Only four tribes have been recognized as having reservations in Kansas, those tribes being the Iowa, Kickapoo, Potawatomi, and Sac and Fox." 28 IBIA 247, 259 n.15.

On January 29, 1996, the Oklahoma Tribe filed its application for acquisition of the "Shriner Tract" adjacent to the Huron Cemetery in downtown Kansas City to be used for gaming. The Tribe alleged that it would purchase the tract with "Pub. L. No. 98-602 funds."[7]

7. Congress enacted Pub. L. No. 98-602 to provide for the distribution of funds appropriated in satisfaction of judgments awarded to the Wyandotte Tribe of Oklahoma pursuant to Indian Claims Commission proceedings. Pub. L. No. 98-602, § 101. Among other things, the Act provided:

> A sum of $100,000 of such funds [allocated to the Wyandotte Tribe of Oklahoma under the act] shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of such Tribe.

Pub. L. No. 98-602, § 105(b)(1), 98 Stat. 3151.

The Pub. L. No. 98-602 funds were given directly to the Tribe in 1984, and were not maintained by the Secretary for the Tribe. Pub. L. No. 98-602 § 101(b)(1). Of the $100,000 to be used for the purchase of real property, the agency admitted that at least $25,000 had already been used by the Tribe for purchase of land in Park City, Kansas. The Secretary stated that if the price of the .52 acres exceeded the Pub. L. No. 98-602 funds [then $70,000], "the Tribe would lose the benefit" of Pub. L. No. 98-602. All three decision-makers who were deposed acknowledged that it was important to the Secretary's Decision, to acquire Kansas land in trust for the Tribe, that the monies used for the purchase be Pub. L. No. 98-602 funds.

The Solicitor's February 13, 1996, opinion assumed that Pub. L. No. 98-602 monies would be used by the Tribe for the purchase of Kansas City, Kansas, property for the Tribe. That statute provided (Cont'd)

On June 12, 1996, after numerous complicated machinations, the Secretary took final agency action by publishing a Notice of Final Agency Determination ("Secretary's Decision") to purchase and take the Shriner Tract into trust for gaming purposes, triggering a 30-day period for commencement of judicial review pursuant to 25 C.F.R. § 151.12 and written agency policy. This lawsuit was commenced by the Governor of Kansas and the Kansas Parties.

ARGUMENT–REASONS FOR DENYING THE WRIT

1. The Decision of the Circuit Court is Not in Conflict with a Decision of Another United States Court of Appeals, Nor Has it Decided an Important Federal Question in a Way That Conflicts with a Decision of a State Court of Last Resort.

Petitioner does not allege that the decision below conflicts with the decision of any federal court of appeals or state court of last resort, and we know of no such conflict. Nothing could be more local than a circuit court giving specific definition to a statute involving a specific geographic location, in the unique and rather bizarre circumstances

(Cont'd)

that $100,000 of funds from a judgment fund "shall be used for the purchase of real property which shall be held in trust . . ." by the government for the Oklahoma Tribe. Pub. L. No. 98-602, 98 Stat. 1351. Although not involved in this petition for certiorari, the circuit court held that those provisions of the public law "imposed a nondiscretionary duty" on the Secretary to take land into trust. *Sac and Fox v. Norton*, 240 F.3d 1250, 1262 (10th Cir. 2001). After complete review of the record, the circuit court concluded that the Secretary's determination that the proper funds were used for purchase "was not supported by substantial evidence in the record." *Id.* at 1265. The circuit court reversed the district court's holding on that matter and remanded the matter to the Secretary for further consideration of the issue. *Id.* at 1264. The issue is still pending.

involved here. The court below was not directly interpreting a treaty or the Constitution of the United States, but rather a decision by the district court in a specific context. Although there is some statutory interpretation involved, it is a highly localized and particularized setting. There is no reason for this Court to review this case.[8]

2. The Decision Below Does Not Warrant the Supervisory Jurisdiction of this Court.

The Court has stated that it will grant a writ of *certiorari* "only for compelling reasons" such as to review a decision that has "so far departed from accepted and usual course of judicial proceeding . . . as to call for the exercise of this Court's supervisory power." Sup. Ct. R. 10. As the history of the Oklahoma Tribe demonstrates, and as will be noted below, there is no such departure here.

3. The Circuit Court's Determination that the Huron Cemetery Is Not the "Reservation" of the Oklahoma Tribe Is Correct Because the Cemetery Is Not a Reservation Within the Meaning of 25 U.S.C. § 2719(a)(1).

The undisputed history of the Huron Cemetery makes it clear that the term "reservation" under IGRA does not include a free-standing *public* burial ground such as the Huron Cemetery.

In enacting IGRA, Congress declared a general prohibition on acquisition of new lands by the Secretary for tribal gaming, stating: "Except as provided in subsection (b), gaming regulated by this Act *shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988. . . .*" 25 U.S.C. § 2719(a) (emphasis added). This prohibition was subject to a

8. Petitioner presents the circuit court's opinion as being in conflict with *Conley v. Ballinger*, 216 U.S. 84 (1910). This is discussed in detail in section 7 of the argument herein.

few specific exceptions in 25 U.S.C. § 2719(a), as follows: "[no gaming on land acquired after October 17, 1988] unless – (1) such lands are located within or contiguous to the boundaries *of the reservation of the Indian tribe on the date of enactment of this Act* [enacted October 17, 1988]." 25 U.S.C. § 2719(a)(1) (emphasis added).

If new land is acquired which is not contiguous to an existing reservation, then gaming can proceed *only* if stringent requirements are met, including the concurrence of the governor of the state where the lands are located. 25 U.S.C. § 2719(b)(1)(A).

The adjacent Shriner Tract cannot be placed in trust *for gaming purposes* by the Tribe absent compliance with 25 U.S.C. § 2719(b)(1)(A) unless the Huron Cemetery was the "reservation" of the Oklahoma Tribe on October 17, 1988. Thus, "reservation" within the meaning of IGRA has a special connotation limited to certain lands in trust status prior to 1988. As noted earlier, if the Cemetery is not a reservation, then compliance with IGRA requires: 1) consultation with state, local and nearby tribal officials; 2) a determination that a gaming facility on the newly acquired lands would be in the best interest of the tribe and its members and would not be detrimental to the surrounding community; and 3) concurrence of the governor of the affected state to the acquisition. None of these three requisites is satisfied here.

The most reliable indicator of Congress's intent in allowing trust acquisitions for land contiguous to reservations is the language of IGRA itself. Although the term "reservation" is not defined in IGRA, words of a statute should be construed in accordance with their ordinary or common meaning. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary . . . meaning." *Johns v. Stewart*, 57 F.3d 1544, 1555 (10th Cir. 1995) (citing *Perrin*

v. United States, 444 U.S. 37, 42 (1979)); *Bartlett v. Martin Marietta Operations Support, Inc.*, 38 F.3d 514, 518 (10th Cir. 1994) ("The court is obliged to give terms their plain meaning whenever possible.").

Undoubtedly in 1988, Congress understood the phrase, "the reservation of the Indian tribe," in its ordinary and common meaning as "land set aside for the *residence* of tribal Indians." *Felix S. Cohen's Handbook of Federal Indian Law*, 34-35, (Renard Strickland ed., 2d ed. Michie 1982) (*1982 Handbook*) (emphasis added). According to the foremost legal scholar in Indian law, Felix Cohen, this common understanding of the term "reservation" has been the accepted meaning of the term recognized since the 1840s. *Id.*

Here the Secretary's Decision equated land "reserved" for the express and sole use as a burial ground for the *public* with land reserved as a *residence* for a specific tribe of Indians. The Secretary concluded that land "reserved" for public burying-ground purposes means "reservation" under IGRA. No justification for this position can be found in the text of IGRA or case law. Moreover, had Congress intended to allow gaming on public land contiguous to reserved land in enacting 25 U.S.C. § 2719(a)(1), Congress surely would have expressly said so. Congress's intent to restrict gaming to reservation land is thus clear on the face of the statute itself.

IGRA elsewhere distinguishes between "reservation" land and trust or reserved land. For example, IGRA allows tribal gaming on "Indian lands" as defined by 25 U.S.C. § 2703(4):

> (4) The term "Indian lands" means –
>
> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian

> tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4)(A). Thus, "Indian lands" under IGRA include "reservation" lands *and* certain types of lands "held in trust" by the United States for a tribe or Indian. 25 U.S.C. § 2703(u)(B). IGRA distinguishes and does not equate the two categories of lands. Under the Secretary's interpretation that "reserved" lands are the same as a "reservation," subcategories (A) and (B) of the definition of "Indian lands" in Section 2703 would be a redundancy.[9]

Congress clearly understood that not all "Indian lands" are "reservation" lands. Had Congress intended to broaden the classification of Indian lands under the Act, Congress could have used "Indian country" as the definition of "Indian lands," but it did not. Thus, even assuming *arguendo* that the Huron Cemetery is held in trust by the United States for a tribe, that would still not qualify that parcel as a "reservation" under IGRA. The Secretary's Decision to acquire the Shriner Tract as contiguous to a "reservation" was legally baseless and an abuse of discretion.

Congress's definition of the term "Indian lands" as including both "reservation" and "lands held in trust" is a key to understanding Congress's intent. "It is axiomatic that the statutory definition of the term excludes unstated meanings of the term." *Meese v. Keene*, 481 U.S. 465, 484 (1987). By including trust lands within the definition of

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9. The Secretary's interpretation thus runs afoul of the rule of statutory construction that statutes should be interpreted so that every term has meaning and is not a mere surplusage. As the Tenth Circuit stated in *Homeland Stores, Inc. v. Resolution Trust Corp.*, 17 F.3d 1269, 1273 (10th Cir. 1994), "We begin with the established principle of statutory construction that, if possible, '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.'" (citation omitted).

"Indian lands," Congress demonstrated that it was aware that trust lands are included within the term "Indian country" for jurisdictional purposes, but did not intend that it be included within the term "reservation" as a definition of "Indian lands."

IGRA makes clear that mere trust status is not sufficient to bring land within the Act's definition of "reservation" for purposes of 25 U.S.C. § 2719(a)(1). The Secretary may not take land into trust for an Indian tribe for purposes of gaming unless "such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988." 25 U.S.C. § 2719(a)(1). The only pertinent exception to this prohibition, absent here, is if the "Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." 25 U.S.C. § 2719(b)(1)(A).

Congress did not make the same exception applicable for off-reservation lands "held in trust" for a tribe. On its face, therefore, absent state consent, IGRA prohibits the Secretary from taking land adjacent to the Huron Cemetery without full compliance with the conditions of IGRA, including the concurrence of the Governor of Kansas.

There is no evidence in the record to support the conclusion that the Huron Cemetery is the "reservation" of the Oklahoma Tribe as required by 25 U.S.C. § 2719(a)(1). There is no evidence in the record that the Oklahoma Tribe resided on the Huron Cemetery as of October 17, 1988, the effective date of IGRA. There is no evidence in the record that the Huron Cemetery was ever declared a "reservation" by congressional enactment. To the contrary, the record shows that the Oklahoma Tribe's members reside more than 200 miles from the Huron Cemetery on land set apart for their residence by Congress as of 1867. The only congressional

enactments dealing with the Cemetery refer to it as a cemetery or "public burying-ground," and nothing more.[10]

The circuit court's decision is also correct because the Huron Cemetery is not subject to the jurisdiction of the Oklahoma Tribe within the meaning of IGRA. The Indian Gaming Regulatory Act allowance for gaming is limited to "[a]ny Indian tribe having jurisdiction over Indian lands," or to "Indian lands with such tribe's jurisdiction." 25 U.S.C. §§ 2710(d)(3)(A), 2710(b)(1). Even if the Huron Cemetery were deemed a "reservation" under the Act, the Oklahoma Tribe does not have "jurisdiction" over the Cemetery. *See also* 25 U.S.C. § 2703(4) (one element of the definition of "Indian lands" is that the tribe "exercises governmental power" over the lands); 25 C.F.R. 151.2(f) (for purposes of trust acquisition, "Indian reservation" is defined as "that area

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10. Congress has restated its intent that the Cemetery be used only for cemetery purposes on numerous occasions.

> (1) the term "Huron Cemetery" means the lands that form the cemetery that is popularly known as the Huron Cemetery, located in Kansas City, Kansas, as described in subsection (b)(3); and
>
> . . .
>
> (b)(1) The Secretary shall take such action as may be necessary to ensure that the lands comprising the Huron Cemetery (as described in paragraph (3)) are used only in accordance with this section,
>
> (2) The lands of the Huron Cemetery shall be used only –
>
> (A) for religious and cultural uses that are compatible with the use of the lands as a cemetery; and
>
> (B) as a burial ground. . . .

Pub. L. No. 105-83, 111 Stat. 1543, § 1567, enacted Jan. 7, 1997. Subsequent appropriation acts have sustained this view. *See also* Pub. L. No. 105-277, 112 Stat. 2681, enacted Oct. 21, 1998; Pub. L. No. 106-113, 113 Stat. 1501, enacted Nov. 29, 1999; Pub. L. No. 106-291, 114 Stat. 945, enacted Oct. 11, 2000.

of land over which the tribe is recognized by the United States as having governmental jurisdiction").

The Oklahoma Tribe was unable to demonstrate the "presence of concrete manifestations of [governmental] authority" over the cemetery. *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 703 (1st Cir. 1994) (Indian tribe must exercise governmental power over Indian land in order to trigger IGRA).

Indian tribes are sovereign governments with jurisdiction over both their territory and their members. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). The geographic scope of tribal sovereignty is limited to "Indian country." *See Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998).

In no sense of the term can it be said that the Huron Cemetery is today the sovereign territory of the Oklahoma Tribe, or that the Cemetery qualifies as "Indian country" subject to tribal jurisdiction. Nor could the Huron Cemetery qualify as a "dependent Indian community" under the Indian country statute. *See* 18 U.S.C. § 1151. This Court has ruled that two requirements must be met to qualify for this classification: 1) "they must have been set aside by the Federal Government for the use of the Indians as Indian land;" and 2) they must be under "federal superintendence" and active control of the Federal Government. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). In light of the undeniable fact that the Huron Cemetery was set apart as a *public burial ground*, the first requirement is not met. The second requirement likewise is not satisfied because the record reflects an unbroken history of municipal or private superintendence of the Cemetery, rather than Federal management and control.

Nor could the Oklahoma Tribe establish tribal jurisdiction by showing the exercise of governmental power over the land. Congress did not define what it meant by the exercise of governmental power in IGRA. In *Cheyenne River*

Sioux Tribe v. South Dakota, 830 F. Supp. 523, 528 (D.S.D. 1993), *aff'd*, 3 F.3d 273 (8th Cir. 1993), the district court identified five factors that may be useful in determining whether a tribe exercises governmental power for IGRA purposes: 1) whether the land is developed; 2) whether tribal members reside on the land; 3) whether any governmental services are provided and by whom; 4) whether any law enforcement on the lands in question is provided by the tribe or the state; and 5) other indicia as to who exercises governmental power over the land.

The Oklahoma Tribe did not, and cannot, satisfy any of these factors. The Huron Cemetery has not been developed beyond the original purpose for which it was established, as a public burial ground. No tribal members reside there now, and no tribal members have ever lived there. Neither the Oklahoma Tribe nor the federal government has ever provided any governmental services to the land, and neither do so today. The agency record is devoid of any evidence that the Oklahoma Tribe ever conducted any governmental affairs on the land. The Tribe provides no police or other law enforcement services to the Cemetery, and has never done so at any time in the past. The City of Kansas City has exercised jurisdiction over the land since at least 1918 and continues to do so today.

Moreover, a fundamental aspect of tribal sovereignty is the authority to exclude or expel non-members from an Indian reservation. *Duro v. Reina*, 495 U.S. 676 (1990). It is not disputed that the Oklahoma Tribe has no authority to exclude or expel any person from a *public* burying-ground.

These circumstances compel the conclusion that the Oklahoma Tribe does not exercise jurisdiction over the Cemetery as contemplated by IGRA.

4. The Circuit Court's Determination that the Huron Cemetery Is Not an Indian Reservation for Gaming Purposes Is Correct Because the Term "Reservation" Does Not Encompass A Free-Standing Public Burying-Ground that Has Not Been Used for Any Other Purpose Since at Least 1855.

In its decision, the circuit court held that the critical issue raised by the case was whether the Secretary acted arbitrarily or capriciously in concluding that the Huron Cemetery constituted a reservation for the purposes of IGRA. *Sac and Fox Nation of Missouri, et al. v. Norton, et al.*, 240 F.3d 1250, 1264 (10th Cir. 2001).

After reviewing the facts and law, the circuit court concluded that the Secretary's determination that the Huron Cemetery was a reservation for the purposes of IGRA was incorrect and not supported by substantial evidence in the record. *Id.* at 1267.

The question of the status of the Huron Cemetery certainly is critical. If the Cemetery is deemed a reservation of the Oklahoma Tribe, then the Tribe may be able to acquire land adjacent to it for the purposes of gaming without many of the safeguards of IGRA.[11]

Several reasons support the circuit court's conclusion that the Huron Cemetery does not constitute a "reservation" of the Oklahoma Tribe. First and foremost, the plain language of the 1855 Treaty reserving the parcel as a "*public* burying-ground" does not allow for such an interpretation, and settled Indian law doctrine precludes any different interpretation.

11. As we noted previously, the Oklahoma Tribe cannot simply buy land in Kansas City and build a casino because IGRA prohibits gaming on any land acquired after October 17, 1988, *unless* that land is located within or adjacent to a reservation that existed as of that date. *See* 25 U.S.C. § 2719(a)(1). Thus, the Oklahoma Tribe attempts to declare the Huron Cemetery – an old public "burial ground" in downtown Kansas City – to be part of the Oklahoma Tribe's "reservation".

The Treaty provided that the "Wyandott Nation hereby cede and relinquish to the United States all their right, title and interest. . . ." to the Cemetery and other land so that the lands may be ". . . subdivided, assigned and reconveyed . . ." to individuals and members of the tribes except that ". . . the portion now enclosed and use a public burying-ground, shall be permanently reserved and appropriated for that purpose. . . ." Treaty of 1855, art. 2, *reprinted in* 2 Kappler at 678.[12]

As the language and history of the Treaty of 1855 demonstrate, the United States did not intend, and at no time stated, that the Huron Cemetery was being reserved for any purpose other than that of a *public* burial ground. Neither in the Treaty of 1855 nor in any subsequent congressional enactment did Congress say that it had acquired or is maintaining the Huron Cemetery in trust for the Oklahoma Tribe as a tribal reservation. The land in question was never declared "reservation" land by any congressional enactment and nothing in the record below demonstrated otherwise.

Rather, the Treaty of 1855 specified that the parcel was to be solely and "permanently" used as a "public burying-ground." A permanent and *public* burying-ground never used by the Tribe for any other purpose simply cannot constitute a "reservation" under federal law. As noted earlier, the Cemetery, located in downtown Kansas City, Kansas, contains a number of Indian and non-Indian burials, and is located more than 200 miles from the Oklahoma Tribe's reservation in Oklahoma.

Moreover, the Cemetery was never a "residence" of the Oklahoma Tribe. The *residence* of Indians on the land is the *sine qua non* of an Indian "reservation" for IGRA purposes. The modern meaning of "Indian reservation" emerged in the 1850s, and referred to:

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12. The full text of article 2 is include in this brief at Section 2 "Relevant History of the Wyandotte Indians and the Huron Cemetery."

> land set aside under federal protection for the *residence* of tribal Indians, regardless of origin. By 1855 this meaning was firmly established in law and was intended in the Indian Major Crimes Act.

1982 Handbook at 34-35 (emphasis added).

As the Interior Board of Indian Appeals analyzed this question in a 1995 decision, the term "reservation" appears in several other Indian statutes, notably the Indian Reorganization Act ("IRA"), 25 U.S.C. § 467, which authorized the Secretary to establish new "reservations" and to add lands to existing "reservations," which "shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to *residence* at such reservations." *Wyandotte Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs*, IBIA 95-79-A, 28 IBIA 247 (Oct. 25, 1995) [23 Indian Law Rep. 7081] (emphasis added).

A parcel that serves a particular purpose, such as a public cemetery, that is not otherwise located within a reservation on which tribal members live, does not in itself constitute a reservation.[13] There is no evidence in the record that any Oklahoma Wyandotte ever lived on the Huron Cemetery and certainly they did not do so after 1855. The Secretary's

13. The other uses of the term "reservation" for civil and criminal jurisdictional purposes are not pertinent here. The existence of "Indian country" as presently defined in 18 U.S.C. § 1151(a) is the basis for determining federal and tribal jurisdiction for purposes of criminal and civil jurisdiction. *United States v. John*, 437 U.S. 634 (1978); *see Decoteau v. District County Court*, 420 U.S. 425, 446-447, n.2 (1975) (noting that while section 1151 is concerned facially only with criminal jurisdiction, the Court recognizes that it generally applies as well to civil jurisdiction). Section 1151(a), as defined by the federal case law, is not the basis for determining whether a parcel of land is a "reservation" for purposes of IGRA. 25 U.S.C. § 2719(a)(1).

determination was contrary to law and without support in the agency record. The circuit court decision under the facts of this case was correct.

5. The Circuit Court's Determination that the Huron Cemetery Is Not an "Indian Reservation" Is Consistent with Relevant and Readily Available Historical Materials.

Mr. Robert Anderson, the Associate Solicitor who authored the two unsupported opinions on which the Secretary's Decision was based, candidly admitted in his deposition that all the grounds for his opinions were cited in the opinions themselves. Anderson Dep., at 44:9-12; 46:3-11 (Vol. III, App. Tab. 93, 570-71). Anderson admitted he did not review documents at the National Archives regarding the Huron Cemetery. Anderson Dep. 42:14-43:1 (Vol. III, App. Tab. 93, at 570).[14]

The Interior Department's wholesale failure to look at the readily-available history of the Cemetery would be negligent in the best of circumstances. Here, given the key nature of this determination to the trust acquisition, the failure constituted arbitrary and capricious action and an abuse of discretion which mandated reversal of the Secretary's Decision.

Dozens of documents in the National Archives collection attest to the character of the Cemetery as a public burying-ground, and nothing more. Since the Treaty of 1855, the Cemetery has been reserved for use as a public burying-ground, subject to the right of the members of the former Wyandottes (Kansas and Oklahoma), to be buried there. This dedicated status does not a reservation make.

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14. Although this case below was an appeal on the administrative record, the district court properly allowed limited discovery including depositions of key officials to augment the record and determine its completeness.

Indeed, over the years, Interior officials reiterated that the Cemetery was only a burial ground and that the only rights of the Tribe were burial rights (and rights to proceeds if and when Congress authorized and completed sale of the Cemetery, which never happened). Over the years, the federal government often ignored the Oklahoma Tribe's desires with regard to the Cemetery. There is no indication that anyone, from the United States Attorney General to the local Indian Commissioner, considered the Cemetery to be an Indian reservation. The Oklahoma Tribe did not even take care of the Cemetery. Pursuant to an agreement entered into in 1918, the City of Kansas City maintained and policed the parcel. Indeed, the federal District Court for the District of Kansas determined that the Oklahoma Tribe had abandoned any interest in the parcel. *Kansas City, Kansas, et al. v. United States et al*, 192 F. Supp. 179, 180 (D. Kan. 1960).

The public burying-ground is a public burying-ground, not an Indian reservation. The determination by the Secretary that the Cemetery was an Indian reservation had no basis in law or fact, and was properly set aside by the circuit court.

6. The Determination that the Huron Cemetery is the "Reservation" of the Oklahoma Tribe is Contrary to Public Policy as Expressed in IGRA.

There are historical and policy reasons why Congress would choose to allow an exception for gaming on lands contiguous to a tribe's existing "reservation" lands but not on lands which were simply held in trust or reserved for a particular use of an Indian tribe. Chief among these reasons is that IGRA came about in response to a specific United States Supreme Court decision, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

In *Cabazon*, this Court held that the Cabazon Band of Mission Indians in California could conduct certain gaming on its reservation, limiting the State of California's attempts to regulate such reservation activity. IGRA represented

Congress's efforts to impose a federal regulatory scheme in the wake of *Cabazon* and the increasing number of tribal gaming enterprises. *See* S. Rep. No. 446, 100th Cong., 2nd Sess. 1-2, *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3071-73 (discussing the background leading to the development of the bill later enacted as IGRA, Pub. L. No. 497, 100th Cong., 2d Sess., 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-21 (1988)).

In enacting IGRA, Congress recognized that after *Cabazon*, tribes could conduct gaming on existing reservation land where gaming is "permitted" in the state of residence. *See* 25 U.S.C.§ 2701(5). Congress also wanted to promote tribal economies as well as to creating mechanisms for regulation of gaming. *See* 25 U.S.C. §§ 2701-02 (findings and declaration of policy). However, in 25 U.S.C. § 2719(a), Congress drew the line on further expansion of lands for such gaming, proscribing gaming on lands acquired by the Secretary under his trust responsibilities after the effective date of IGRA, October 17, 1988.

Similarly, Section 2719(b)(1)(A) reflects Congress's concern about the impact that a tribal gaming facility off-reservation would have on state government and non-Indian neighbors. Congress concluded that state governors and non-Indian citizens should be given a voice in the IGRA process and that the Secretary must consult and consider their well-being. Indeed, the concurrence of the governor must be achieved before gaming is allowed off-reservation on newly acquired lands. 25 U.S.C. § 2719(b)(1)(A).

There are numerous reasons why local authorities must concur. Gaming facilities may create law enforcement problems. When a facility is located on a reservation, one can presume tribal government has weighed these issues carefully and made an informed decision and has also made provisions through tribal law enforcement officers to assist

with these potential issues. When such a facility is located off-reservation, the tribe's ability to control the potential problems is lessened. Further, the interests of state and local entities are correspondingly greater. Congress intended that its non-Indian neighbors be consulted and governors concur. Section 2719(b)(1)(A) fulfills that purpose.

In sum, the circuit court correctly concluded that Congress did not intend in enacting 25 U.S.C. § 2719(a)(1) to include the Huron Cemetery, land reserved for a particular specified use as a public burial ground.

7. The Circuit Court's Decision is Consistent with Judicial Precedent.

Petitioner claims that the case of *Conley v. Ballinger*, 216 U.S. 84 (1910), "acknowledged that the Huron Cemetery was reservation land." Petitioner's Brief at 11. That case does no such thing. In *Conley*, this Court repeatedly noted that the Cemetery land was for use as a public burying-ground. The Court never implied that the Huron Cemetery was a "reservation." The case was brought by an individual, one Lyda Conley. Ms. Conley attempted to sue Secretary of the Interior Ballinger to enjoin him from selling or distributing land in the Cemetery. At the time, the government was evidently threatening to remove the remains of persons buried to another designated place and sell the burying-ground. *Conley* at 89. Ms. Conley's parents and sister were buried in the Cemetery. *Conley* at 88. In her complaint, Conley alleged that she had "seisin, and a legal estate and vested rights in and to . . ." portions of the Cemetery. *Conley* at 89. The case was dismissed for lack of standing and jurisdiction. That dismissal was affirmed by this Court on appeal. There is nothing in *Conley* which supports the view that the Cemetery was anything but a cemetery. The issue in *Conley* was simply whether an individual could sustain a suit against the United States. This Court held that there were no *individual* rights with reference to the Cemetery to be

upheld. It does not represent a ruling on the *status* of the *land* for the purposes of IGRA.

Petitioner also cites two other cases as support for the idea that somehow the Huron Cemetery, reserved as a public burying-ground, is in fact the Oklahoma Tribe's "reservation."

The first, *Seymour v. Superintendent*, 368 U.S. 351 (1962), Petitioner's Brief at 18, is inapposite. *Seymour* is a criminal case. There, a member of the Colville Tribe in Washington State, one Paul Seymour, was charged with burglary within the Colville Indian Reservation. He was convicted in state superior court. He brought a petition for a writ of habeas corpus urging that his state conviction was improper since there was no state jurisdiction over him or the crime, it having been committed in Indian country as defined in 18 U.S.C. § 1151. *Seymour* at 352. The trial court denied the writ solely on the grounds that the burglary had occurred within what was once an Indian reservation but had "since been dissolved. . . ." *Id.* at 353.

The case involved whether a 1906 act, providing for the sale of mineral lands and for settlement and entry under homestead laws on the reservation, actually ended the reservation's existence. *Id.* at 354-55. This Court held that it did not end the reservation status under the particular circumstances of that case. Noting that an earlier 1892 act had expressly "vacated and restored to the public domain . . ." the north half of the reservation, this Court noted that the 1906 act contained no such express language. *Id.* It is clear that at the time of the criminal acts in *Seymour* and at all times previous to that, the land in question had been an Indian reservation set aside as a residence for the Indians in 1872. *Id.* at 354. This Court also noted that Congress had subsequently specifically recognized the continuance of the reservation as a reservation for the Colville Tribe. *Id.* at 356.

The second case Petitioner cites is *United States v. Celestine*, 215 U.S. 278 (1909). Petitioner's Brief at 18. *Celestine* is also inapposite. In that case, a member of the Tulalip Tribes residing on the Tulalip Indian Reservation in Washington State was accused of murder of another tribal member. Both tribal members had been allotted land on the reservation under the Tribes' treaty of January 22, 1855 (12 Stat. 927). The offense allegedly took place upon the allotment of the victim. Both the perpetrator and victim had been issued "patents" for their land. The alleged perpetrator of the crime, Bob Celestine, argued that federal courts had no jurisdiction over him for murder under the federal Major Crimes Act, 18 U.S.C. § 1153, because the land was allotted to him individually. *Celestine*, at 280. This Court held that the offense was clearly committed within the "limits of the Tulalip Indian Reservation," and that even though the individuals involved had received allotments from the government as to their specific land, ". . . both tracts remained within the reservation until Congress excluded them therefrom." *Celestine*, at 284. There is no application to this case.

As the district court noted in *Kansas City, Kansas*, the Wyandotte Indians who moved to Oklahoma after the Treaty of 1855 "do not use it [the Huron Cemetery] and since their removal to Oklahoma have not used it. They have no interest in maintaining it as a cemetery." *Kansas City, Kansas, et al. v. United States, et al.*, 192 F. Supp. 179, 181 (D. Kan. 1960).

And, as noted earlier, the Interior Board of Indian Appeals has specifically found that the Oklahoma Tribe has no Kansas reservation. *Wyandotte Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs*, 28 IBIA 248 (1995). The Board held that the Oklahoma Tribe does not have an existing reservation in Kansas, noting "Only four tribes have been recognized as having reservations in Kansas,

those tribes being the Iowa, Kickapoo, Potawatomi, and Sac and Fox." *Id.* at 262 n.15.[15]

In *Oyler v. Allenbrand*, 23 F.3d 292, 295-96, 299 (10th Cir. 1994), the circuit court also confirmed that the only four Indian reservations existing in Kansas are those of the four Kansas Tribes herein. There was no recognition of any Oklahoma Wyandotte reservation in Kansas. Thus, the circuit court's decision in this case is entirely consistent with existing precedent.

CONCLUSION

This case involves a very particularized situation involving an historic public burying-ground in downtown Kansas City, Kansas. In an attempt to gain a commercial advantage for gaming purposes, the Oklahoma Tribe sought to have the cemetery determined to be a "reservation" for the Tribe so that it could acquire land next to the cemetery for gaming purposes without meeting the requirements of IGRA. Those requirements include concurrence of the Governor of Kansas as to gaming, and a finding that the gaming will not be detrimental to the public interest. 25 U.S.C. § 2719(b). Under the facts of this case, the Tenth Circuit Court of Appeals correctly concluded that the public burying-ground was not a reservation for the Oklahoma Tribe. The circuit court's finding is well supported by the historic record, the administrative record and applicable case law of this Court and other judicial bodies which have considered the question. This case does not involve questions of national significance nor does the decision below depart from the "accepted and usual course

15. There is no indication that the Oklahoma Tribe appealed the Board's decision. Therefore, under the doctrine of res judicata/ collateral estoppel, the Tribe is bound by the Board's decision that the Huron Cemetery is not its "reservation," and should not be allowed to relitigate that issue here. *Anglemyer v. Hamilton Co. Hosp.*, 941 F. Supp. 976, 978-79 and n.3 (D. Kan. 1996) (discussing the required elements of and policies behind the doctrine).

of judicial proceeding . . . as to call for the exercise of this Court's supervisory power." Sup. Ct. R. 10. The petition should be denied.

Dated: November 14, 2001

Respectfully submitted,

JOHN R. SHORDIKE
TOM WEATHERS
ALEXANDER & KARSHMER
2150 Shattuck Avenue
Suite 725
Berkeley, CA 94704
(510) 841-5056
Counsel for Sac and Fox Nation

MASON D. MORISSET
Counsel of Record
M. FRANCES AYER
MORISSET, SCHLOSSER, AYER & JOZWIAK
801 Second Avenue, Suite 1115
Seattle, Washington 98104-1509
(206) 386-5200
Counsel for Prairie Band of Potawatomi Indians

CHARLEY LAMAN
TRIBAL ATTORNEY
TRIBAL ADMINISTRATIVE ANNEX
GOLDFINCH & K-20
P.O. Box 110
Kickapoo Reservation
Indian Country, KS 66439
(785) 486-2131
Counsel for Kickapoo Tribe in Kansas

BRIAN JOHNSON
OFFICE OF THE ATTORNEY GENERAL
120 SW Tenth Avenue
Second Floor
Topeka, KS 66612
(785) 296-2215
Counsel for Governor Bill Graves

MARK GUNNISON
PAYNE & JONES
11000 King Street
Suite 200
P.O. Box 25625
Overland Park, KS 66210
(913) 469-4100
Counsel for the Iowa Tribe of Kansas and Nebraska, and Local Counsel for the Prairie Band of Potawatomi and the Sac and Fox Tribe

No. 01-445

In The

Supreme Court of the United States

THE WYANDOTTE NATION,
a federally recognized tribe,

Petitioner,

vs.

SAC AND FOX NATION OF MISSOURI, IOWA TRIBE OF KANSAS AND NEBRASKA, PRAIRIE BAND OF POTAWATOMI INDIANS, KICKAPOO TRIBE OF INDIANS AND BILL GRAVES, GOVERNOR OF THE STATE OF KANSAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO RESPONDENTS' OPPOSITION BRIEFS

MICHAEL MINNIS, OBA #6521
DAVID MCCULLOUGH, OBA #10898
Counsel of Record
MICHAEL MINNIS & ASSOCIATES, P.C.
100 N. Broadway Ave., Ste. 3160
Oklahoma City, OK 73102-8805
(405) 235-7686 FAX (405) 232-5460

Attorneys for Petitioner Wyandotte Nation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY TO RESPONDENTS' OPPOSITION BRIEFS

Two briefs have been filed in opposition to the Petition filed by the Wyandotte Nation. One was filed by the plaintiffs/appellants below who collectively refer to themselves as the "Kansas Parties." See "Brief in Opposition for Respondents" at 1, n. 2. The other brief was filed by the United States apparently[1] for the Secretary of Interior, the defendant/appellee below. "Brief for the Federal Respondent in Opposition."

The Kansas Parties assert that Section 2719(a)(1) of the Indian Gaming Regulatory Act (25 U.S.C. § 2701 *et seq.*) authorizes federal appellate courts[2] to determine *ad hoc* without deference to the Secretary of the Interior whether Indian land is a "reservation" solely for the purpose of IGRA gaming. Thus, the Secretary of the Interior will determine whether the Wyandotte's land in Kansas City is an Indian reservation for all federal purposes, but for IGRA gaming which determination will be made by an appellate court.

The United States notes that subsequent to promulgation of the opinion below a new law was enacted "which purports to 'clarif[y]' the Secretary's authority to determine reservation status for purposes of IGRA" and "appears to confirm the Secretary's authority to determine the reservation status of the Huron Cemetery." U.S.

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[1] The "Federal Respondent" does not identify a specific party represented.

[2] The trial court specifically refrained from determining whether the Huron Cemetery "is reservation land" under IGRA. See Pet. App. 48.

Br. at 8-9. However, the United States argues this clarifying law – which is entirely consistent with the Secretary's arguments below – should not be applied to the Wyandotte.

ARGUMENT

1. In adopting IGRA, Congress had no intention to divest the Secretary of the Interior of his authority over Indian lands.

The Secretary of the Interior has been legislatively assigned to regulate United States relations with Indian tribes, most particularly with respect to Indian lands. See 25 U.S.C. §§ 2, 9, 465, 467; see also 9 Stat. 395. Relying on IGRA, the Kansas Parties and the United States attempt to justify bypassing the Secretary to apply a different standard for determining reservation status than that traditionally applied by Congress, the Executive and the Courts. Nothing within the language of IGRA remotely suggests such a radical change in federal Indian policy was intended by Congress when it adopted IGRA.

The United States proposes that:

> without deference to the Secretary's views, [the court of appeals] concluded that Congress used the term "reservation" in IGRA to refer only to "land set aside by the federal government for the occupation of tribal members." . . . The court found support for that construction in IGRA's use of the phrase "*the* reservation of the Indian tribe," . . . which suggested to the court "that Congress envisioned that each tribe would

have only one reservation for gaming purposes." U.S. Br. at 5.

The court of appeals decision and these arguments are inconsistent with Section 2719 of IGRA. The Secretary's responsibility over Indian land decisions is clear from the plain language of Section 2719. For example, Section 2719 generally prohibits gaming on property "acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988." 25 U.S.C. § 2719(a). Congress may require the Secretary to take land in trust for a tribe. However, absent such Congressional direction, the decision to take Indian land into trust is a discretionary act by the Secretary. See 25 U.S.C. § 465; 25 C.F.R. § 151. In deciding whether to take land into trust for the benefit of a tribe, the Secretary is required to determine whether the trust acquisition will "[f]acilitate tribal self-determination, economic development, Indian housing, land consolidation or natural resource protection," and whether "the acquisition provides meaningful benefits to the Tribe that outweigh any demonstrable harm to the local community." 25 C.F.R. § 151.14(a)(1)-(2). If a tribe anticipates using trust property for gaming purposes, the Secretary will have to evaluate whether that property is eligible for gaming under IGRA. The Secretary's decision regarding the "reservation" status of adjoining property would, therefore, be a critical part of any decision to take the land into trust. If courts were to review such a decision *de novo*, they would undermine the very premise upon which the acquisition decision was made. In Section 2719, Congress gave the Secretary explicit authority over other "exceptions" to the general bar on gaming on after-acquired property. Under Section 2719(b)(1)(A), for

instance, the Secretary may permit gaming on such property if it would be in the best interest of the tribe, not detrimental to the surrounding community, and if the state concurs. See also 65 Fed. Reg. 55471 (proposed Interior regulations governing gaming on such property). In addition, Section 2719(b)(1)(B)(iii) permits tribes to game on property that is taken into trust as part of "the restoration of lands for an Indian tribe that is restored to federal recognition." A determination of that nature – evaluating whether a tribe has been "restored" to federal recognition – is an issue squarely within the Secretary's responsibilities. The Secretary is also required to approve tribal-State compacts – approval that would not be appropriate if the compact allowed gaming on property that was not eligible for gaming under IGRA. See 25 U.S.C. § 2710(d)(8).

The Secretary therefore has jurisdiction over the decision to take land into trust, which triggers inquiries under section 2719, and jurisdiction over a critical exception to the general bar set out in Section 2719(a). The Secretary of the Interior has 150 years of experience – both in making legal interpretations regarding and in participating in the creation and modification of reservations. The Secretary will necessarily have to make determinations under Section 2719(a) prior to decisions to take land into trust, as well as prior to decisions regarding whether to approve a tribal-State compact. The Secretary's determinations regarding the "reservation" status of land in any other circumstance will have substantial practical implications for property owned by or held for the benefit of a tribe. All of these considerations indicate

substantial practical experience by the Secretary regarding the question presented here and demonstrate that Congress at least implicitly understood that the Secretary would be responsible for the resolution of this question in a variety of circumstances. Such an understanding requires that the courts defer to the Secretary's determinations regarding whether property is a "reservation" under section 2719(a)(1).

2. Congress has legislatively clarified that the Secretary of the Interior is the proper authority for determining what land constitutes reservation for purposes of IGRA.

Not only is it clear that Congress implicitly understood the Secretary's role in determining the reservation status of land under IGRA, but Congress has subsequently made explicit what was implicit by enacting the "clarifying" legislation noted by the United States. U.S. Br. at 8. Section 134 of Public Law 107-63 provides:

> The authority to determine whether a specific area of land is a "reservation" for purposes of section 2701-2721 of title 25, United States Code, was delegated to the Secretary of the Interior on October 17, 1988: *Provided,* That nothing in this section shall be construed to permit gaming under the Indian Gaming Regulatory Act on the lands described in section 123 of Public Law 106-291 or any lands contiguous to such lands that have not been taken into trust by the Secretary of the Interior.

Although admitting that "Section 134 thus appears to confirm the Secretary's authority to determine the reservation status of the Huron Cemetery," the United States argues that "the particular circumstances of this case does not present a question that warrants the Court's review." U.S. Br. at 8-9. Thus, the law is to be applied one way for the Wyandotte and another way for all others. This is patent unequal treatment under the law and, like all cases of unequal protection of the laws, it undermines faith in the judicial system. Under the United States' argument, courts do not have to follow the law when it does not like the circumstances. The role of the courts is to review laws that specifically allow disparate treatment under certain circumstances, not to treat litigants differently when the law does not purport to allow distinctions.

If, as the Court's initial opinion recognized, the term "reservation" is ambiguous in IGRA, the Secretary is entitled to deference in determining what land is a "reservation" under that statute. As long as the Secretary's determination is a reasonable one, Courts should defer to the decision. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 & n. 11 (1984).

In rejecting the Secretary's decision that the Huron Cemetery was a reservation, the court of appeals construed "reservation" as used in IGRA [§ 2719(a)(1)] to refer to just those tracts of Indian lands where the tribe's membership lives. Pet. App. at 35. This limitation is contrary to at least 150 years of practice and ignores the fact that Indian lands long considered reservations are broadly diverse. This diversity, by itself, at least makes it reasonable to believe that Congress did not intend "the reservation" to mean only the tribe's primary residential

area. In fact, the United States vigorously so contended in its petition for rehearing filed below:

> As the Department was well aware in reaching its decision in this case, tribes throughout the nation own "reservation" lands that are not only non-contiguous, but on which no members of the tribe reside. [footnote: Setting aside for the moment those reservations that are made up of "checkerboarded" sections, several examples come to mind. The Pit River Tribe in California, for instance, has jurisdiction over several separate rancherias, which are considered "reservations" under federal law and subject to the full range of tribal rights and responsibilities associated with reservations. Along with at least six other properties, no one of which could easily be deemed the tribe's "core" reservation, the tribe has jurisdiction over the Likely Rancheria in Burney, CA. This piece of the tribe's reservation is a 1.32 acre cemetery. See http://istsocrates.berkeley.edu/"espm5Oac/CAIndians.pdf. At least six other California tribes have non-contiguous parcels, all of which are considered the tribe's "reservation."
>
> The Capitan Grande Band of Diegueno Mission Indians hold nearly 16,000 acres of reservation land on which no tribal members live because the property is now located in a watershed draining to a reservoir used for drinking water. The Red Lake Band in Minnesota owns, in addition to the large reservation around Red Lake, a substantial parcel of reservation land in the Northwest Angle. The Mille Lacs Band of Minnesota owns widely scattered parcels of land in central Minnesota.

> Finally, as with the Wyandotte, who continued to exist between 1956 and 1978, only because the Huron Cemetery was not sold, see US/App. 6C, 6F, the existence of a single tribal cemetery as reservation land was critical to two Washington State tribes seeking to reorganize under the Indian Reorganization Act. Pursuant to 25 U.S.C. § 467, a group of Indians may reorganize under the IRA only if they own a "reservation." Even though the only land held by the Sauk Suiattles and Upper Skagits was a small cemetery, the Secretary approved the tribe's reorganization in the mid-1970s.]
>
> It would be difficult, if not impossible in some cases, to draw a principled distinction between "reservation" land entitled to be considered a reservation under 25 U.S.C. § 2719(a)(1), and "reservation" land that was excluded from that definition. Cf. *Oklahoma State Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991) (noting complexities in evaluating status of Indian lands). The Department therefore chose to apply the traditional meaning of 'reservation.'

Petition for Panel Rehearing for the Federal Appellees, pp. 11-12 (filed May 14, 2001).

The court of appeals refused to defer to the authority of the Secretary and thus never considered whether the Secretary's reasoning on the reservation of the Huron Cemetery was reasonable. By not reviewing the Secretary's decision, the court of appeals implies that the Secretary's decision would have withstood such a review,

i.e., the Secretary's decision was reasonable and entitled to deference.

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

MICHAEL MINNIS, OBA #6251
DAVID MCCULLOUGH, OBA #10898
Counsel of Record
MICHAEL MINNIS & ASSOCIATES, P.C.
100 N. Broadway Ave., Ste. 3160
Oklahoma City, OK 73102-8805
(405) 235-7686 FAX (405) 232-5460

Attorneys for Petitioner
Wyandotte Nation